IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

STEPHEN REDD,

Defendant and Appellant.

CAPITAL CASE

Orange County Superior Court No. 941766
The Honorable Francisco P. Briseno, Judge

RESPONDENT'S BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **STEPHEN REDD,** Defendant and Appellant.	S059531 **CAPITAL CASE**

STATEMENT OF THE CASE

On October 7, 1996, in Orange County, Stephen Redd was charged in a Third Amended Information with second-degree burglary (Pen. Code[1], § 459; counts 1 & 5); the robberies of Dean Bugbee and Brenda Rambo (§ 211; counts 2 & 6); the attempted murders of James Shabakhti and Chris Weidmann (§§ 664/187, counts 3 & 4); and the murder of Timothy McVeigh (§ 187, subd. (a); count 7). As to each offense, it was alleged that Redd personally used a firearm. (§§ 1203.06, subd. (a)(1) & 12022.5, subd. (a).) As to count 3, it was alleged that Redd personally inflicted great bodily injury. (§ 12022.7.) It was further alleged that the murder of McVeigh was committed while Redd was engaged in the crimes of second-degree burglary and robbery. (§ 190.2, subd. (a)(17)(vii) & (i).) It was also further alleged that Redd had five prior serious or violent felony convictions. (§§ 667, subd. (d) & (e)(2); 1170.12, subd. (b) & (c)(2).) (I C.T. pp. 266-269.)

On October 25, 1996, a jury found Redd guilty as charged. The jury found true the special circumstances, that Redd committed the murder of

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1. Unless otherwise noted, all further statutory references are to the Penal Code.

McVeigh while engaged in the commission of burglary and robbery (§§ 190.2, subd. (a)(17)(vii) & (i).) The jury also found true the firearm and infliction of great bodily injury allegations, and that Redd had five prior serious felony convictions. (III C.T. pp. 715-738; IV C.T. pp. 1071-1072.)

On November 15, 1996, the jury returned a verdict of death. (III C.T. p. 999.) On February 28, 1997, the trial court denied Redd's motion for a new trial and sentenced him to death on count 7 and the burglary and robbery special circumstances. The court sentenced Redd to a total determinate term of 111 years to life on the remaining charges and allegations. The sentences for counts 1 and 5 were stayed. (§ 654.) (IV C.T. pp. 1061-1063, 1071-1072.) This appeal is automatic. (§ 1239, subd. (b).)

Herein, Redd claims: the trial court erroneously denied his motion to suppress evidence, and his motion for a line-up; trial counsel was ineffective for "conced[ing]" his guilt as to counts 3 and 4; evidence of out-of-court identifications was erroneously admitted at trial; victim impact evidence was improperly admitted in the guilt phase; the trial court erred by failing to instruct the jury on second-degree murder and manslaughter, and in denying defense counsel's request for special instructions; the prosecutor committed error; the felony-murder special circumstance rule fails to narrow the class of felony-murderers eligible for death; California's statutory death penalty scheme violates the federal constitution; and the effect of the cumulative errors requires reversal.

There is no basis for reversal of either the guilt or penalty phases of Redd's trial. This Court should affirm the judgment and conviction in its entirety.

STATEMENT OF FACTS[2/]

During about a four-month period in 1994, Redd robbed a Sav-On drug store, Vons grocery store, and Alpha Beta grocery store at gunpoint in Orange County. During his flight from the Vons robbery, Redd shot and wounded a private security guard and shot at a second security guard. During the robbery at the Alpha Beta, Redd shot and killed an employee, Timothy McVeigh. The facts and circumstances surrounding Redd's crimes are detailed below.

Guilt Phase - Prosecution

Sav-On Incident (Counts 1 & 2)

On March 13, 1994, around 11:00 p.m., Dean Bugbee was working at the Sav-On Drugstore, located at 2690 Tustin Avenue, in the City of Orange. Bugbee was at the store's safe, completing a final count of the store's money, when a man walked into the store said, "it's time for a til audit," and stuck a gun over the safe door. Bugbee was extremely frightened as the man pointed the gun at him. The man took the money from the safe, put it in the pocket of his jacket, and left. At the time of the robbery, $2000 to $3000 was inside the safe. (5 R.T. pp. 936-937, 940-941, 947-949.) After the incident, Bugbee gave a statement to the police. Frightened, Bugbee described the suspect as a White male, 32 to 38 years old, about 210 pounds with a husky build, who appeared to have dark brown hair. The man wore dark sunglasses, light blue Levis or

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2. The facts are presented in the light most favorable to the judgment. (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.) On appeal, all inferences favor the verdict. It is the trier of fact who determines the credibility of witnesses and the truth of falsity of facts upon which that determination depends, and any contradictions in the testimony must be presumed to have been resolved by the jury. Accordingly, due deference must be given to the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, citing *People v. Jones* (1990) 51 Cal.3d 294, 314.)

jeans, a dark blue zip-up sweat jacket with a hood, which was up, and a dark baseball cap. The man's gun was chrome, perhaps a .45 semiautomatic pistol. (5 R.T. pp. 943-947, 952.)

On June 16, 2004, Bugbee identified Redd from a photographic lineup as the person who looked the closest, due to the shape of his face, as the person who robbed him.[3] Bugbee also stated that if that person in the photograph had put on dark sunglasses, he would say that was the person who robbed him. (5 R.T. pp. 952-956.)

Vons Incident (Counts 3 & 4)

On May 31, 1994, around 10:40 p.m., James Shabakhti, a patrol supervisor for a security company, responded to a report about a transient who was bothering customers at a Vons Market in the City of Orange. Upon his arrival, Shabakhti observed a male individual, whom he later identified as Redd, at the right of the Sav-On Supermarket area. Shabakhti called fellow security officer Chris Weidmann for assistance. Redd walked to the front of the Vons market. Shabakhti drove up to Redd and stopped his car. (5 R.T. pp. 966, 969, 971-972, 1017.)

Shabakhti exited his car, approached Redd, who appeared to fit the description of the person he was asked to check on.[4] Shabakhti asked Redd

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3. Redd was the person depicted in position number three. According to Detective Harper, the only photograph of Redd available at the time the lineup was put together depicted Redd with a mustache and beard. (6 R.T. pp. 1157-1158, Peo. Exh. 10.)

4. At trial, Shabakhti stated that Redd, at the time of the incident, appeared to be wearing a dark colored wig, i.e., his hair looked fake, and had a "transient" appearance. He also wore a dark blue hooded sweatshirt with a zipper in the front, blue jeans, and what appeared to be a black or dark blue beanie. (5 R.T. pp. 976-977.)

what he was doing at that location. Redd did not answer and walked away. Shabakhti asked Redd for identification, Redd said he had none. Shabakhti asked Redd to have a seat, Redd refused to sit. Shortly thereafter, Weidmann arrived on the scene. Redd asked to be let go. About the same time, Weidmann exited his car. Redd pulled a gun, a chrome semiautomatic or automatic weapon, from his jacket. From two feet away, Redd pointed his gun at Shabakhti's face. Shabakhti was very frightened, and he noticed Weidmann run towards his (Shabakhti's) patrol car. Redd fired at Weidmann. Shabakhti heard one or two shots fired, then he ran. As Shabakhti ran, the gun went "off constantly" and bullets hit the cars in front of him. As Shabakhti ran away, Redd shot him in the back. The shot was painful, and Shabakhti thought he was going to die. The bullet entered the tip of his shoulder, took part of his right bone, tore his cartilage, entered and hit his clavicle, and collapsed his lung. (5 R.T. pp. 973-984, 986-990.)

The next day, Shabakhti was shown a photographic lineup at which time he stated that he was 90 to 95 percent sure that the person depicted in position number three, Redd, was the person who shot him. "His eyes were the same." (5 R.T. pp. 992-993, 995.)

According to Weidmann, he arrived at the scene around 10:45 p.m. and observed Shabakhti talking to a White male, between 25 and 35 years old, who wore make-up and a woman's wig, weighed about 200 pounds, stood six foot two inches, and wore a blue or purple hooded sweatshirt. As Weidmann exited his patrol car, the man told Shabakhti, "I'm leaving." Shabakhti replied, "No, you're not, I need to talk to you." The man moved around a pillar towards Weidmann, looked at Weidmann, and pointed his gun at Weidmann's face. Weidmann put his hands up and told the man he was the boss. The man lowered his gun and turned towards Shabakhti. Weidmann ran to Shabakhti's patrol car and attempted to call 9-1-1. As Weidmann dialed 9-1-1, he looked

up, and from three to four feet away, the man pointed his gun at Weidmann, and fired three shots. Weidmann was "stunned," as bullets went towards him as he sat in the car. Glass from the car's windshield touched Weidmann's face. Weidmann grabbed his face, rolled out of the car, and tried to play "dead" in hopes the gunman would stop firing. Although no more shots were fired in Weidmann's direction, Weidmann heard four more shots. Afterwards, the gunman ran from the scene. Moments later, paramedics arrived, and Shabakhti was transported to a hospital. (5 R.T. pp. 1032-1035, 1038-1046.)

That same night, around 10:45 p.m., Stephan Loya and a friend were driving on Bourbon Street when Loya noticed a man jog out of an alley behind an apartment complex, about 100 yards from the back parking lot of the Vons. Loya pulled into the driveway of the apartment complex, parked his car, and got out. The man jogged next to a vehicle, then took what appeared to be a mask off his head. The man was White, his head was shaved, he stood about five foot ten inches, appeared to be 160 to 170 pounds, and wore a dark zip-up sweatshirt. that appeared to have a hood. (6 R.T. pp. 1067-1071.)

The man looked around, then entered a light blue 1984 Ford Tempo. Loya signaled to his friend to get back inside their car so they could follow the man. Loya thought that the man may have robbed someone's car or apartment. Loya followed the man and wrote down the car's license plate number. Initially, Loya followed the man unnoticed. At some point, the man appeared to notice Loya and increased his speed. Eventually, the man slammed on his brakes, skidded to a stop, and leaned over in his seat. Loya did not get next to the man, he was scared the man had a gun. Loya followed the man for about three minutes, but he got away. Immediately thereafter, Loya contacted police. Officers were sent to Loya's location. (6 R.T. pp. 1071-1077.)

Around 11:00 p.m., Detective Linda King was on patrol when she heard a radio broadcast about a shooting incident in the City of Orange. Officers

were told to look for a vehicle described as a light blue Ford Tempo, with the license plate number 2CKC669. Around 1:00 a.m., June 1, Detective King responded to the area of 1301 Deer Park Avenue, in Fullerton. The detective saw a man, whom she later positively identified as Redd, exit a driveway at the Greenhouse Apartments. Redd crossed behind the detective's patrol car, walked into a carport. driveway, and into the apartment complex. Redd stopped and spoke briefly to a security guard. At that point, everything seemed okay. About five minutes later, Detective King noticed a car that fit the description of the car described in the earlier broadcast in the carport. Detective King informed dispatch that she had located the vehicle, asked for back-up, then positioned herself to watch the area. Shortly thereafter, other officers arrived and set up a perimeter. Redd was not apprehended that night. Although it was determined that Redd lived in Apartment 31, when officer's went to Redd's apartment, he was not there. (6 R.T. pp. 1088-1090, 1092-1096, 1098-1101.)

The Alpha Beta Incident And Killing Of Timothy McVeigh (Counts 5, 6, & 7)

On July 18, 1994, around 10:40 p.m., Brenda Rambo and Timothy McVeigh were working at the Alpha Beta Market in Brea. About six customers were inside the store. Rambo was at the register by herself. At some point, a man wearing a "female looking" wig walked into the store, looked at Rambo, and approached her register. The man placed a pack of gum on the counter, and Rambo rang up the purchase. The man threw down a $1 bill and told Rambo, "I guess you'll have to break it." Rambo turned to put the money in the cash drawer and the next thing she knew, the man was pointing a silver chrome-colored handgun at her. Rambo was scared and feared for her life. She was afraid she was going to be shot. The man reached over the counter-belt, pulled the cash tray out of the drawer, and put the tray on the belt. The man

was calm and did not appear nervous. Frightened, Rambo called out for McVeigh. McVeigh came to the front of the store. At that point, the man was still facing Rambo, and he took money from the tray with his left hand and held his gun on Rambo with his right hand. (6 R.T. pp. 1194-1198, 1201-1204.)

McVeigh grabbed the man's left hand with one hand and placed his other hand around the man's right shoulder. The two men ended up face-to-face, a struggle ensued, and the gun went off. McVeigh, who was shot, stepped back. The man then pointed his gun at Rambo. McVeigh fell to the ground. Rambo, who had knelt down, asked the man, "please don't" as he pointed the gun at her. Eventually the man left the store, taking the money with him. (6 R.T. pp. 1205-1208.)

Around 10:40 p.m, Brea Police Officer Kelly Carpenter received a request for emergency assistance at the Alpha Beta. When the officer arrived at the scene, McVeigh was laying inside the doorway. Rambo was standing next to McVeigh, screaming and crying. (6 R.T. pp. 1168-1170.) Officer Carpenter called paramedics, and spoke to Rambo who told him what happened. Rambo described the gunman as a White male, who wore a wig, clear frame dark plastic glasses, a purple-pinkish colored long-sleeved sweatshirt, and jeans. The man had wrinkles on his face, thus Rambo thought he was in his late 40's to early 50's, and his eyes were lighter in color. Rambo also believed he wore a baseball cap. (6 R.T. pp. 1198-1200.)

Officer Carpenter announced the description of the suspect over the police radio. (6 R.T. pp. 1174, 1200; 7R.T. 1288-1289.) Officer Carpenter walked around the scene. He found a shell casing in the aisle next to the register, and a pair of glasses outside the store in the side parking lot that fit the description provided by Rambo. (6 R.T. pp. 1175, 1178, 1180-1181, 1183.) Around 11:30 p.m., Detective Jerry Brakebill arrived on the scene and spoke to Rambo. (7 R.T. pp. 1435-1436.)

The next morning, at approximately 2:30 a.m., McVeigh died. (6 R.T. p. 1183.) Doctor Richard Fukumoto performed the autopsy on McVeigh's body. The most significant injury found by the doctor was "a close contact gunshot with the entry located within the left abdominal wall a little to the left of the midline." The condition of the entry site was consistent with the evidence that indicated that the two men had grappled very closely and that a gunshot went off in close proximity to McVeigh. A bullet was retrieved from McVeigh's back. McVeigh also suffered various scratches and bruising on his hands, neck, forehead, and left lower lip, as well as injuries to the back of his head that could have been consistent with falling and hitting his head on the floor. (7 R.T. pp. 1294, 1298-1299, 1311-1314.)

On July 21, 1994, Rambo viewed a photographic line-up (Peo. Exh. 100). Rambo identified appellant as the person depicted in position number 2, as looking "very similar" to the man who robbed her and shot McVeigh. (6 R.T. pp. 1212, 1216-1217.)

The Apprehension Of Redd

On March 6, 1995, around 4:53 p.m., Officer Robert Jansing of the United States Park Police, was patrolling the north end of the Golden Gate National Recreation Area, in San Francisco, when a small brown Datsun sedan, which was parked, caught his attention. The registration tag on the car's license plate did not appear to be permanently affixed to the plate. Although the tag was dated March 1995, Officer Jansing questioned the validity of the tag and ran a computer check on the license plate. Officer Jansing learned that the car's registration had actually expired in March 1994, thus he concluded that the tag did not belong to that car. Officer Jansing noticed a man, who later would turn out to be Redd, sitting inside the Datsun, so he parked directly behind the car. The officer approached Redd, asked him for his driver's license and

registration, and told Redd that the vehicle's registration had expired. (7 R.T. pp. 1360-1366.)

Redd claimed that he had just purchased the car and gave Officer Jansing a piece of paper, a bill of sale for the car in someone else's name. Redd also claimed that he had a valid driver's license but he did not have it with him at the time. Redd gave the officer a birth certificate bearing the name Richard Redd, born January 18, 1948. Redd claimed that he was Richard Redd and that his birth date was January 18, 1948. At trial, Officer Jansing explained that, based on the his experience, people who are "wanted" often use documents such as birth certificates in someone else's name, so he ran a driver's license check on the name Richard Redd with that birth date. Officer Jansing was informed that there was no record that matched the information he had provided to the dispatcher. (7 R.T. pp. 1366-1369.)

Officer Jansing told Redd that he did not believe that he had given him his correct name and that he believed he might be wanted on warrants. Officer Jansing stated, "You're lying about your name, I want your correct name. If you don't give me your real name, you're going to be going to jail." Redd insisted that he had given the officer his correct name. Officer Jansing asked Redd to step out of the car and placed him in handcuffs for officer safety. He also told Redd that he was under arrest. Officer Jansing immediately searched Redd for some other form of identification and found his driver's license with his true picture and name, Stephen Moreland Redd, date of birth June 4, 1945. (7 R.T. pp. 1370-1372.)

Officer Jansing ran a warrant check on Redd and learned that Redd was wanted in Orange County for murder and robbery. Officer Jansing requested and received permission to impound Redd's car from his supervisor. Before the officer started the impound, he asked dispatch to inquire if the agency that had issued the warrants on Redd wanted to inventory the car before his agency did.

Subsequently, Officer Jansing searched Redd's car and found numerous weapons and ammunition, including a loaded .380 caliber semiautomatic pistol. He also found wigs, ski masks, and other "things of that nature." (7 R.T. pp. 1372-1374, 1376-1380.)

Investigation Information

Detective Michael Harper was involved in the investigations of the Shabakhti shooting and the Bugbee robbery. At some point, Detective Harper received information about vehicle license plate number, 2CKC669, and he determined that the vehicle with that plate number was registered to Robert Redd[5/], who resided at 360 East Irma Street, apartment K, in La Habra. Detective Harper directed officers to go to that address and locate the vehicle. The vehicle was not there. At some point, Detective Harper obtained Redd's address, on Deer Park. Detective Harper went to that location and spoke to the manager of the apartment complex. Subsequently, the detective searched Redd's apartment. Detective Harper noticed items with Redd's name. He also found a red watch cap, a blue watch cap, latex gloves, and a light brown wig. (6 R.T. pp. 1144-1145, 1147-1151, 1165.)

According to Detective Harper, Redd's blue Mercury Topaz, license plate number 2CKC669, was located at the Deer Park Apartments by Detective King. A bill of sale in Redd's name, and a blue baseball cap was found inside the car. Receipts for ammunition for a .380 semi-automatic handgun and lasers were found inside Redd's apartment. Two live rounds of ammunition for a .380 caliber pistol were found inside Redd's bedroom closet. Shabakhti was

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5. Robert Redd was Redd's father. The car in question was apparently initially described as a Ford Tempo, which apparently looks similar to a Mercury Topaz. Redd was the registered owner of the Topaz on May 31, 1994. Sometime between May 31, 1994, and April 23, 1995, ownership of the Topaz was transferred to Robert Redd. (6 R.T. pp.1163-1164.)

shot with .380 caliber semi-automatic handgun. (6 R.T. pp. 1152-1156.)

In July 1994, Dennis Fuller, a forensic scientist with the Orange County Sheriff's Crime Lab, received the bullet retrieved from McVeigh's body, a shell casing found at the Alpha Beta, and six shell casings and two bullets recovered from the shooting at the Sav-On. Fuller was asked to determine whether the items were related to each other. Based on his test results, Fuller opined that the bullets had been fired from the same handgun. (7 R.T. pp. 1395, 1397.) Several months later, Fuller tested a firearm recovered upon Redd's arrest to determine if the bullets and shell casings he had previously received came from that weapon. In sum, based upon his examination of the weapon, bullets, and casings, Fuller opined that all of the items, including the bullet retrieved from McVeigh's body, were fired from that weapon. (7 R.T. pp. 1397, 1407-1408, 1433.)

After Redd was arrested, Detective Brakebill went to San Francisco to view Redd's car. The detective had information that the suspect in the crimes he was investigating had been described as having worn a wig and glasses. Rambo had also told Detective Brakebill that the man who shot McVeigh had worn a purple hooded sweatshirt and glasses. Redd's car was inventoried. At trial, Detective Brakebill described numerous items, including weapons and boxes of ammunition found inside the interior or trunk of Redd's car, including: a money bag; a registration for another car; a black, Kevlar, bulletproof helmet; Kevlar, bulletproof body armor; two magazines for a .380 caliber semiautomatic weapon; a blue beanie; clips for an AR-15; a gun sight, live rounds of .223 ammunition strips for a Colt AR-15; three wigs, two were brown and appeared to be female, the other was blonde; a baseball cap; a purple sweater with a hood; and two pairs of glasses, one pair of sunglasses, and possibly one pair of clear glasses. (7 R.T. pp. 1437-1438, 1440-1450, 1452-1459.)

Defense

Redd presented no evidence on his behalf. (7 R.T. p. 1498.)

Penalty Phase

Redd was a Los Angeles County Sheriff's deputy from 1967 to 1973, when he resigned. During the penalty phase, the prosecution introduced evidence relating to Redd robbing a store and four banks at gunpoint in Orange County over a six week period in 1982. While fleeing from the fourth bank robbery, Redd shot a police officer. The circumstances surrounding Redd's prior armed robberies is detailed below.

Prosecution - Prior Offenses

On September 30, 1982, Gay Swanberg worked as a cashier for the Akron Store. Around 7:45 p.m., Swanberg heard a noise at the door and looked up to see a White male, with long hair, wearing sunglasses and a blue jacket, walk directly towards her cash register. The man pulled a gun, a semiautomatic weapon or some type of sawed-off shotgun, from his jacket. Swanberg was very frightened. She reached for a microphone in an attempt to call the store manager. The man told her not to touch the microphone and said, "Give me the money out of the cash register." Swanberg handed him about $150, and he put it in his pocket. The man told Swanberg that he had spent .50 cents on his bullets and he did not plan on wasting any. The man left the store and ran across the street. Swanberg called the police, told them what happened, and gave them a description of the suspect. The man had been very calm during the incident. Swanberg recalled that she was able to identify a blue jacket worn by the suspect and the weapon used by the suspect, at the preliminary hearing. She could not recall if she was asked to make an

identification. (9 R.T. pp. 1915-1921, 1923-1924, 1927.)

On October 2, 1982, around 8:00 p.m., Dennis Misko, Laura Meraz, and Michael Carson were working at the Federated Group in Santa Ana, when Misko noticed a man, Redd, wearing a dark black wig enter the store. Carson asked Redd if he could help him. Redd opened his coat and said, "You sure can, I want your bread. Give me your bread." Redd had a sawed-off rifle, about two feet long, that appeared to be an Army issued M-1 or M-14 that had an altered stock. Misko thought Redd was joking due to his wig, i.e., his "comical appearance." Misko even giggled and said something like you've got to be kidding. Redd told Misko not to be a hero, it was not a joke, then "jacked a round" into the chamber of his gun as he pointed it at Misko. Misko was frightened and concerned about his two employees who were behind the counter with him. Redd turned and pointed his gun at Carson and ordered him to open the cash register. Carson, a new employee, was unable to open the register. Meraz opened the register, at gun point, and gave Redd several hundred dollars. Redd ran out of the store. Misko called 9-1-1. (9 R.T. pp. 1929-1938.)

According to Meraz, when Redd commented about needing some "bread," she and the others kind of giggled. Redd pulled out a gun, said he was serious, and pointed his gun at all three employees. Meraz was very frightened. Redd told Meraz to give him the money. She did. About $600. When Redd asked if that was all the money, Meraz offered him the coins. Redd said never mind and left the store. At some point, the police arrived and took their statements. (9 R.T. pp. 1940-1944, 1965-1967.)

On October 6, 1982, Glibert Quihuiz, Heather Deane, Shannon Miller Hedges, and Della Gonzales, worked at the Brookhollow Branch of Bank of America, in Santa Ana. Around 10:40 a.m., a man with a large gun underneath his coat entered the bank. The man wore dark sunglasses, a dark coat- i.e., a

nylon flight jacket, dark pants, and what appeared to be a dark wig. The man held his gun closely to his chest. He approached Deane and asked her if she was a new teller. Deane fell to her knees and said yes. The man said, "Give me your money," and added, "and yes, this is a real machine gun." Gonzales went to Deane's aide and lifted her up. Deane withdrew money from the cash drawer, placed it on the stand, and the man put the money in his coat. He then went to Hedges' window and indicated to her that she should give him her cash. She did. (9 R.T. pp. 1951-1954, 1956-1957, 1959.)

Quihuiz tried to conceal his cash and closed his drawer. The gunman approached Quihuiz, pointed his gun at him and said, "That's right, open that bottom drawer and give me your cash." Quihuiz placed some money on the counter. Gonzales, who was standing next to Quihuiz said, "No, give it all to him." Quihuiz put more money on the counter. The man took about $1500 from Quihuiz. Afterwards, the man started to walk out of the bank and said, "My landlord's going to love me for this." He also said, "Don't try to follow me, I really do shoot people," and, "You all have a nice day because I'm going to have a great one." (9 R.T. pp. 1954, 1957-1958, 1960-1961.)

On October 27, 1982, Gary Stewart was a bank teller at the Southern California Bank located on Katella in Orange. About 10:05 a..m., a man who stood about six feet tall, weighed about 200 pounds, wore dark glasses, a dark windbreaker and jeans, and had long dark hair that looked like a wig entered the bank and approached Stewart and asked if he was open. Stewart, who was doing book work, said no. The man asked Stewart if he could cash a check anyway. Stewart told the man to go to another teller. The man took a step back. Stewart heard a noise, and looked up. The man was pointing a small dark metal rifle at Stewart. He told Stewart that he was open now and told Stewart to give him all of his "bread." Stewart was frightened. (10 R.T. pp. 1997-1999, 2003.)

Stewart gave the man "bait money," i.e., money marked with serial numbers that could be traced back to the bank if found by police. Stewart did not press the alarm, he was afraid the man would have noticed him press the alarm. After the man took about $1600 from Stewart, he walked down the teller line and, at gun point, took money from tellers Georgia Wright, Georgiann Dresser, and Tanya Moya. Before the man left the bank he said, "Unemployment is great. I used to be poor. Now I'm rich. I do this all the time." As the man left he said, "Have a good day." He told everyone not to leave the bank for ten minutes. The man was very calm during the robbery. (10 R.T. pp. 1999-2002, 2006-2007.)

Everett Caldwell was present during the robbery. He heard a man tell one of the tellers, "This is a hold up. I want only big bills placed on the top of the counter." Caldwell looked up and saw that the man was holding a short. version of a rifle. The man wore dark clothing, a waist jacket, blue jeans, and horn-rimmed glasses. He was stocky, and had "an awful lot of hair or it was a wig." The man was very calm and acted like he knew what he was doing. The man took the money off of the counter and put it in his jacket pocket. On his way out of the bank, the man told everyone to stay at least ten minutes or he'd "blow their heads off," or something to that effect. The man was serious. That same day Caldwell told the police that the man appeared to be having a good time. (10 R.T. pp. 1985-1992, 1995.)

On November 10, 1982, Michael Canzoneri worked at the Security Pacific Bank, East La Habra Branch. Canzoneri was at his desk when he noticed a man walk towards his teller window. The man had black or real dark collar length hair, wore dark glasses, a navy blue flight jacket, and blue jeans. He appeared stocky, about six foot tall, close to 200 pounds. Canzoneri walked to his window and asked the man if he needed help. The man stopped at Canzoneri's window and said give me all your money. Canzoneri asked the

man if he was kidding. The man threw a gun onto the counter, pointed it at Canzoneri's chest, and said he was not kidding. The gun was about 18 to 24 inches long with a blunt barrel, rounded or sawed-off, and had a pistol grip. Canzoneri was frightened but tried to remain calm. He gave the robber just under $1500. The robber put it in his pocket, then moved to Jackie Coffery's window. The robber pushed or told the customer at Coffery's window to move back, demanded money from Coffery, got it, then moved to Sharon Snowden's window. (10 R.T. pp. 2009-2016.)

At trial, Canzoneri recalled that he had told police after the incident that the robber said, "Where is the teller that was at the station," and "You want me to shoot some customers up?" The robber had been in the bank for about five minutes, and was extremely calm until he got to the last teller window. When he left, the robber said something to the effect of don't go outside, or it's not safe. (10 R.T. pp. 2017-2018.)

According to Coffery, the robber had made a very visible entrance into the bank. He announced himself as he entered and got everyone's attention. Coffery could not remember what he said, but it was not normal behavior which got her attention. She knew immediately it was a robbery. After the man robbed Canzoneri, he went to Coffery's window. He pushed aside the customer Coffery was helping, pointed his gun directly at Coffery, and asked for her money. Coffery gave him about $1000. The robber said a number of threatening things. Coffery could not recall exactly what he said but she was threatened and feared for her life. The man had pointed his gun directly at Coffery's stomach and he was very menacing and threatening, and he did not seem nervous. The man left Coffery's window, and went to Snowden's window. (10 R.T. pp. 2025-2032.)

Snowden noticed the robber shortly after he entered the bank. He was about six feet tall, appeared Hispanic, had dark hair, and wore a blue jacket and

jeans. At some point, the man came to her window, and pounded on the counter with something in his hand. Snowden was not at her window at the time and the robber told her to get by her window. Snowden did not move at first because she could not believe what she saw. Snowden moved to her window, and the robber said, "You bank tellers are an endangered species." Snowden took that to mean that he was going to hurt. her if she did not do what he asked. The robber stuck his gun in Snowden's face. Snowden was frightened. He told Snowden to give him all her money. Snowden "scooped up" the bait money and gave the man all the large bills she had, about $900. The man shoved the money into his jacket pocket. As the robber left the bank, he said, "Have a nice day." Sometime after the man left the bank, Snowden heard gunfire. (10 R.T. pp. 2038-2043, 2045.)

That same day, then police officer John Reese was on patrol with Sergeant Tom Machado, when they heard another patrol unit dispatched to a silent alarm at the Security Pacific Bank. The officers were was less than half a block away from the bank, so they decided to respond to the call. When they arrived at the scene, Officer Reese positioned his patrol car so that they could see the front and side doors of the bank. As Officer Reese took cover behind the door of his patrol car, he saw an individual exit the side door of the bank. The man looked "different" and wore a "tanker" jacket. Officer Reese told the man, "Hold it right there." The man stopped in his tracks, looked east to the alley, then back at the officer, then he ran east. Officer Reese pursued the man on foot. The officer could not see whether the man had a gun. The man turned a corner, and the officer lost sight of him. Officer Reese looked inside a dumpster and inside nearby carports but did not see the man. (10 R.T. pp. 2047, 2050-2056.)

Officer Reese continued to search for the man. When the officer reached Stearns Avenue, he saw the man running east about fifty to sixty yards away.

The man crossed the street. Officer Reese drew his weapon and ordered the man to halt. The man continued to run and went into a big bush next to the sidewalk. Officer Reese took cover in a nearby bush. The next thing Officer Reese knew, the man stepped out of the bush and a burst of gunfire came towards him. Officer Reese tried to get closer to the wall. The officer could not recall how many shots were fired, but it sounded like rapid fire. One of the shots hit Officer Reese midway between his ankle and knee on his right leg. The officer stuck his gun through the bush but he was unable return fire because there were civilians in the area. (10 R.T. pp. 2056-2057, 2059-2061.)

After the man shot Officer Reese, he ran down an alley. The officer knew the alley had a dead-end. Officer Reese saw a car, an "old clunker" 1969-1971 Chevy Chevelle, with a poor paint, emerge from the alley. Moments later, Sergeant Machado found Officer Reese. Officer Reese told Sergeant Machado that the driver of the car, Redd, resembled the man who shot him. At that point, other patrol units arrived and pursued the vehicle. Officer Reese was transported to the hospital. Officer Reese was initially told that his leg would have to be amputated. He had ten surgeries on his leg. As a result of his injuries, Officer Reese was unable to return to work as a patrol officer. Rather, he had to work at desk. (10 R.T. pp. 2061-2065.)

On the day of the incident, Officer John West responded to the scene and joined in the pursuit of Redd. During the pursuit, Officer West twice attempted to apprehend Redd using his own car but was unsuccessful. At one point, Redd drove past Officer West and the officer heard two shots fired. The officer noticed that the back window of Redd's car was blown out. One of the bullets hit the windshield of the officer's patrol car. The officer continued to pursue Redd. At one point, between 15 and 20 police cars were in pursuit of Redd. (10 R.T. pp. 2082-2096, 2098.)

Officer Raymond Breur had also responded to the incident. Sergeant

Machado advised Officer Breur of Redd's whereabouts. As Officer Breur searched the area, he observed a car exit a nearby alley. The driver, Redd, exceeded the speed limit by 10 to 15 miles per hour, despite the presence of police activity. Officer Breur followed Redd. Redd ran a stop sign so the officer activated his siren. As the officer pursued Redd, Redd's vehicle's back window exploded. Officer Breur heard automatic weapon fire, and it sounded as if bullets had hit his patrol car. The officer could not count how many shots were fired because they were so rapid. After the shots were fired, Redd accelerated. Officer Breur continued his pursuit, during which Redd ran three stop signs. Eventually, Redd drove onto the freeway, and the pursuit went through four separate counties, Los Angeles, Riverside, San Bernardino, and Orange, and lasted for 40 to 50 miles. (10 R.T. pp. 2104, 2106-2113, 2115, 2118-2119.)

At one point during the pursuit, Redd drove past Officer Jose Talavera. Redd made eye contact with the officer, waved, and appeared to smile as he drove by the officer. (11 R.T. pp. 2151-2152, 2155.) Officer Mike Cordua assisted in the pursuit of Redd, by helicopter. From the helicopter, Officer Cordua fired one shot at Redd's car. Redd immediately pulled over and put his arms out the window of his car. (11 R.T. pp. 2158, 2160, 2164-2167.) Redd was captured and taken into custody by Officer Breur. (10 R.T. pp. 2120-2121.)

After Redd was taken into custody, several guns and ammunition were found in his car including: a loaded AR-7 Explorer .22 caliber rifle with a silencer; a loaded Browning high-power .9 millimeter semiautomatic pistol; a loaded automatic Ruger mini-14, .223 caliber gun; a loaded H and K Model 91 .308 caliber rifle; three boxes of .308 caliber ammunition; one magazine for a H-K 91 with 20 live rounds; magazine for an AR-7 with eight live rounds; two magazines for a Browning high-power .9 millimeter; and several expended

rounds of various ammunition, i.e., at least 22 expended casings from two different weapons. A gray sweatshirt; a blue long-sleeved sweater; and a red sweatshirt, were also found. (11 R.T. pp. 2181-2192.)

After Redd's car was searched, officers went to the residence located at 3369 Blue Lantern, Apartment H, in Dana Point, to search for additional evidence. A large amount of weapons and ammunition, and four wigs were recovered from the residence. (11 R.T. pp. 2192-2194.)

Victim Impact Evidence

Cheryl McVeigh was Tim McVeigh's sister, they were best friends. Cheryl was a single parent and Tim spoiled her children. Tim was not aggressive, he never hurt anyone, and he was non-judgmental. Cheryl missed Tim's hugs and his telling her that there was always tomorrow. Cheryl could talk to Tim about anything and everything. Talking to a headstone was not the same. (11 R.T. pp. 2220-2224.)

Michael McVeigh was Tim's younger brother. When Michael and Tim were younger, they did things together, i.e., camping and fishing. Tim allowed Michael to be part of his circle of friends despite the age difference. Tim was very giving and he even let Michael borrow his first new car for the senior prom. Michael was horrified to learn that his brother had been murdered. Michael and Tim were so close, it was tough for Michael to realize that he could not hug his older brother one last time or tell him how much he loved him. (11 R.T. pp. 2225, 2227-2228, 2230-2231.)

James McVeigh was Tim's father. Tim was a good son, a fun kid, and a nice guy to be around. There was a hole in James that will never be filled because he did not have the chance to say goodbye to his eldest son. It was not fair that he lost a child, parents are not supposed to bury their children. (11 R.T. p. 2233.)

Carol McVeigh was Tim's mother. Tim always checked on Carol and they became very close, almost best friends. Tim was fun to be with, he was wonderful, and just had a goodness about him. Tim had a passion for flying, and he had always wanted to be a pilot. One day, Tim surprised Carol and informed her that he had put himself through school and became a certified jet pilot. When Carol learned that her son had been shot, she felt as if she had died inside. At the hospital, when the doctors came out, Carol could tell by the looks on their faces that it was bad, they would not let her see her son. Carol did not get to say good-bye to her son. Any mother would have been proud to have Tim for a son. (11 R.T. pp. 2234, 2237-2241.)

Defense

Redd's Family Members

According to Redd's mother, Rosemary, Redd had a regular happy childhood. He did very good in grade school, his teachers regarded him highly, and he had no significant behavior problems at school. Redd was not in a gang. He graduated high school, went to junior college, married in 1965, and had three children. In 1967, Redd joined the Los Angeles Sheriff's Department. When Redd went to prison in 1983, Rosemary remained in contact with him, and visited him quite often. Rosemary maintained a relationship with Redd and supported him as much as she could. (12 R.T. pp. 2313-2316, 2318-2323.)

Redd's son, Michael, had a pretty good relationship with Redd. As children, Redd engaged his sons in activities such as skiing, going to the movies, and surfing. Redd taught his sons the construction trade, and how to work on building a house. Michael valued his relationship with Redd. Michael still loved Redd very much. (12 R.T. pp. 2324, 2326-2328, 2331.)

On cross-examination, Michael admitted that he saw Redd at Christmas in 1993, about three months before Redd robbed the Sav-On. Redd behaved

normally and did not appear to have any mental problems. Michael had seen Redd twice. Redd seemed perfectly fine and happy to see Michael, and he did not appear to have any personal problems. According to Michael, before Redd committed the robberies and the attempted murder of the police officer, he was upset that he did not have any work. Michael was not aware of any physically ailments that prevented Redd from working. Michael had only seen Redd three times in the last 15 years. Redd had been in jail for most of the last 15 years. (12 R.T. pp. 2334-2337, 2341, 2343.)

Redd's youngest son, Sean, was young when his parents separated. Redd was a good father. Although money was tight, Redd did what he could for the family. Sean joined the military at seventeen. He had seen Redd twice since. Sean valued his relationship with Redd and loved him very much. Sean understood that what Redd did was bad and that he needed to be punished. (12 R.T. pp. 2347, 2349, 2351, 2354-2355.)

Redd's daughter, Melissa, lived with her mother most of the time when she was growing up. Melissa had positive memories of Redd from when she was around 10 years old. Melissa had not seen much of Redd over the past 14 years. Redd sent her letters and drew pictures for her children. Melissa loved Redd but never had a chance to know him so she could not say much about him. Melissa had not seen Redd much since she was 12, Redd had been in jail for much of her life. (12 R.T. pp. 2367, 2369, 2372-2373, 2376-2377.)

In the summer of 1994, Eugene Lin offered Redd temporary work at a hotel he owned. Redd worked for Lin from September 17, 1994, until October 3, 1994. One day, Redd suddenly left even though Lin owed him $80. On May 9, 1995, Lin received a letter from Redd. Subsequently, Lin sent a copy of the letter and a check for $80 to Redd's mother. (12 R.T. pp. 2381-2385, 2404-2405, 2416-2417.)

According to Redd's brother, Richard, he and Redd were close when

they were younger. The break-up of Redd's marriage and the loss of his job as a sheriff's deputy hit Redd pretty hard.[6] It was a rough time for Redd, he appeared to be "getting hard" from those experiences. For a time, Richard and Redd worked together in construction. At some point, Redd was basically broke and out of work. He began to overeat, read Solider of Fortune magazine, and talked about going off to war. (13 R.T. pp. 2453, 2455, 2459-2461, 2463.)

After Redd was released from his previous incarceration, he lived with Richard for about six months. Redd tried to get work but was unsuccessful. At some point, Redd found a job with a plumber and eventually moved out of Richard's trailer. Richard and Redd always had a good relationship. Richard felt indebted to Redd. Apparently, at some point, when Richard had lived at his parents, the house had filled up with gas. Redd happened to come home, and he grabbed Richard, stuck his head out a window, and pounded on his back. Redd then got their parents. Richard believed Redd had saved his life on that occasion. (13 R.T. pp. 2464-2467.)

On November 10, 1982, Richard noticed that Redd had large amounts of cash. On November 17, Richard told police that about a week prior to the November 10, robbery, Redd was in a real good mood. (13 R.T. pp. 2498, 2500.)

Redd's Former Co-workers

Former Los Angeles Sheriff's Deputy Wiley Newman met Redd at the Firestone division. Newman worked with Redd for about one week. Newman and Redd responded to a fire together. Newman ran into a burning house and

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6. Redd voluntarily resigned as a Los Angeles County Deputy Sheriff in October of 1993, at a time when his performance was deemed unsatisfactory and a recommendation that he undergo psychiatric evaluation. (14 R.T. pp. 2855-2857.)

saved a man. Redd did not go inside the house. Newman received a medal of valor for saving the man's life. Redd received a medal because he was Newman's partner. (14 R.T. pp. 2734, 2739-2740.) Newman knew Redd from about 1970 to 1973. Newman was not aware that Redd had quit the force until within a year of this trial. (14 R.T. pp. 2748-2749.)

Former Los Angeles Sheriff's Deputy Allen Campbell knew Redd from the sheriff's academy, they graduated at the same time. Campbell did not consider Redd a close personal friend, nor was he ever partnered with Redd. The last time Campbell saw Redd was in either 1972 or 1973, at the West Hollywood Station. Redd walked up to Campbell and said he quit. (13 R.T. pp. 2521-2522, 2529-2530, 2532.) Campbell thought Redd was strange and unusual. (13 R.T. pp. 2541, 2549.)

Former Los Angeles Sheriff's Deputy Thomas Grant worked in the West Hollywood division the same time as Redd. Grant initially found Redd to be very upbeat. According to Grant, on one occasion, he heard about an incident involving a traffic accident and a car fire in which there was a fatality, over the radio. Grant learned that Redd was involved in that incident. That same evening, Grant saw Redd at the station. Redd appeared somewhat disturbed, unlike his normal personality. The next day, Redd spoke about the incident at a station meeting. In sum, Redd was shook up because he had apparently watched a passenger, who was trapped in the car, burn to death. Redd apparently felt responsible for the matter. Grant did not specifically see any changes in Redd but he heard stories about "behavioral issues." Grant left the West Hollywood station shortly thereafter and had not seen Redd since. (13 R.T. pp. 2566, 2569-2572, 2574-2575.)

The Experts

Norman Morein, a sentencing consultant, was retained to examine

Redd's records and determine how well Redd had adjusted during his previous incarceration, April 1983 until sometime in 1992. Although records demonstrated that Redd have been involved in three negative incidences, including an attempted escape, Morein thought that Redd had one of the best prison records he had ever seen. The reports indicated that Redd was a good worker and there were a lot of "positives." Morein opined that Redd's adjustment to the state prison system had been very good, and he would do very well if he were returned to prison. (13 R.T. pp. 2599, 2608, 2611-2618, 2626.)

On cross-examination, Morien stated that, based on information he had received, he considered Redd to be of superior intelligence. Morien admitted that one of the reports he reviewed noted that Redd had spent about eight weeks planning his escape, during his previous incarceration. Redd used a chemical compound to cut the bars of his cell. Redd had requested to work in the prison kitchen, apparently at night, so he could work on the bars of his cell during the day. Morein found this indicative of a very calculating and manipulative person. Prior to his attempted escape, Redd also participated in an electronics course where he had access to batteries. When Redd escaped from his cell, he managed to make it over the first of two fences. Redd disregarded the tower officer's order to halt and, despite a warning shot, he continued to run to the second fence. The tower officer was forced to shoot Redd to prevent his escape. (13 R.T. pp. 2646-2647, 2649, 2657-2658, 2660-2661, 2663.)

Records indicated that, starting in December 1993, after he was released from prison, Redd attended about nine psychological counseling sessions for anger management. At some point, Redd quit the sessions because he felt they were not necessary. (13 R.T. pp. 2667, 2670, 2677.) Sometime thereafter, Redd committed a number or crimes, including murder. (13 R.T. pp. 2670-2671.)

Robin Klein, a clinical psychologist, worked with police officers. Klein testified extensively about the psychological effects that police officers incur as a result of their work. Klein admitted that police officers or former police officers are no more likely to commit crimes than any other segment of society. Klein never interviewed or met Redd. In testifying about issues suffered by police officers, Klein had not referred to Redd. (14 R.T. pp. 2756, 2758-2773, 2785-2786, 2789-2792, 2799, 2807.)

Michael Mantell, a clinical psychologist, worked with various law enforcement agencies. He was primarily responsible for pre-employment psychological screenings and fitness for duty evaluations. Mantell reviewed materials, including Redd's school records and attendance records. Nothing in Redd's school records indicated that he had suffered any underlying psychological dysfunction, stress, or trauma. (14 R.T. pp. 2816, 2818, 2826-2829.)

Mantell also reviewed an informational packet that contained several documents related to Redd's employment with the Los Angeles Sheriff's Department. Redd received three evaluations while he was assigned to the Firestone division. The first evaluation, dated April 13, 1969, rated him as competent. A second evaluation, dated October 4, 1970, also rated Redd as competent. However, it was noted that Redd could improve in applying common sense to certain field situations and radio transmissions. A third and final evaluation dated April 11, 1971, also rated Redd as competent, but it was noted that he occasionally displayed a lack of workable police knowledge and common sense. Redd was receptive to peer counseling and made a conscious effort to improve. He was not referred for psychological counseling. (14 R.T. pp. 2829, 2845, 2848-2852.)

A review dated October 1, 1971, during Redd's assignment at the West Hollywood division rated Redd's performance from competent to outstanding.

A second review, dated November 2, 1972, rated Redd's performance as competent and noted that he had received two citizen commendations. However, it was noted that Redd displayed below average work in observing rules and regulations, and getting along with fellow employees, apparently as a result of personal problems. (14 R.T. pp. 2852-2853.)

Mantell also discussed a performance evaluation dated November 1, 1973, that was related to a termination effective October 1973. The evaluation indicated that Redd's work habits were unsatisfactory, and that his work and personal relations needed improvement. A list of "difficulties" appeared in the commentary section, which also mentioned Redd's volitional decision to quit. On October 7, 1973, one day before Redd resigned, the West Hollywood Station Commander recommended that Redd undergo psychiatric evaluation. There was also a reference to a previous session for psychological counseling which took place on September 9, 1972, for similar problems. Mantell noted that Redd had displayed "vacillating behavior patterns and attitudes" for those previous two years. Redd had previously attended a psychological counseling session, and it was recommended, at that time, that he undergo a psychological evaluation. (14 R.T. pp. 2855-2857.)

A termination record dated October 19, 1973, noted Redd had been warned about his attitude and appearance, and that he was visibly depressed. Redd had been involved in two off-duty incidents, a veiled threat towards a fellow deputy with his off-duty weapon, and a vehicle code violation. Other incidents included Redd being late to work, failing to report to duty, mishandling of prisoner's money, falsifying police reports, poor decisions in the field, and failure to comply with departmental policy. According to the report, despite these problems, Redd was not going to be fired, but rather sent to a psychiatrist. The report pointed out that Redd resigned one day before psychiatric care was initiated. (14 R.T. pp. 2858-2859.)

Mantell opined that there was a correlation between the reported fire incident that Redd had witnessed and his job performance, and that he had suffered a psychological deterioration between 1971 and 1974. (14 R.T. pp. 2861-2863.) Mantell admitted that he did not meet or talk to Redd in formulating his opinion. He did not think it was necessary, "given what [he] was asked to share [his] expertise about." (14 R.T. p. 2867.)

According to Mantell, the term "anniversary reaction," was used to describe "the way a person deals who has not really dealt with the trauma deals with it in future years." In other words, sometimes people who do not deal well with a traumatic event at the time it occurs will suffer an anniversary reaction sometime in the future. (14 R.T. pp. 2865-2866.) Mantell could not state whether Redd had an "anniversary reaction" when he shot Shabakhti or when he killed McVeigh, or when he committed the various bank robberies in 1982. It was possible that Redd just wanted to rob people of their money and chose to commit crimes. (14 R.T. pp. 2906-2908.)

ARGUMENT

I.

THE SUPPRESSION MOTION WAS PROPERLY DENIED

Redd claims that the trial court erred in denying his motion to suppress evidence pursuant to section 1538.5. Proffering numerous grounds of error, Redd contends that his detention, arrest, and the subsequent search of his car violated his Fourth Amendment rights under the federal Constitution. (AOB 69-126.) Most of Redd's contentions are forfeited because he failed to assert them below. Nonetheless, Redd has failed to establish that the trial court erred in denying the motion. As evidenced by the arguments in Redd's Opening Brief, Redd's contentions rest on his mistaken belief that the arresting officer acted beyond the scope of his jurisdiction. As demonstrated herein, because Redd was subject to a lawful warrantless arrest and the subsequent search of his car was proper, the trial court properly denied the motion to suppress.[7/]

A. The Suppression Hearing

At the September 13, 1996, suppression hearing, the prosecution presented the following evidence.

On March 6, 1995, around 5:00 p.m., United States Park Police Officer Robert Jansing was patrolling the north end of the Golden Gate National Recreation area, in San Francisco, when he noticed a brown Datsun sedan parked in an area known as Gas House Cove. As the officer drove by the car, he noticed that the 1995 registration tag on the vehicle's license plate was not completely flat on the plate, a small portion of the tag was sticking up. The

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7. Respondent has addressed Redd's assertions in the order they were presented in the Opening Brief.

officer explained that, based on his experience, often a tag in that condition did not belong on the plate, so he requested information on the license plate. The vehicle's registration had expired a year earlier. Officer Jansing contacted Redd, who was seated in the driver's seat, and asked for his driver's license and vehicle registration. The officer told Redd that the car's registration had expired. Redd claimed he had recently purchased the car and was unaware of the origin of the 1995 registration tag. Redd gave Officer Jansing a birth certificate which bore the name "Richard Redd," and claimed that was his name and all he had for identification. Redd claimed he had a valid driver's license in that name but it was not in his possession at the time. (1 R.T. pp. 41-45.)

Officer Jansing ran a records check on the name and birth date listed on the birth certificate Redd had provided. There was no match for a driver's license. Officer Jansing approached Redd again and told him that he thought he was lying about his name. When the officer asked Redd for his correct name, Redd insisted he was Richard Redd. Officer Jansing asked Redd to exit the car and put his hands behind his back. Officer Jansing handcuffed Redd with the intent to arrest him for not having a valid driver's license in his possession, providing a false name, and the vehicle registration violation. At the hearing, Officer Jansing explained that he did not believe Redd had given him his correct name, and the only way to verify Redd's name was to take him to jail where a fingerprint identification process would verify Redd's identity. (1 R.T. pp. 45-47.)

After placing Redd under arrest, Officer Jansing searched Redd's person and pulled a wallet out of Redd's rear pocket. Redd's driver's license was inside his wallet. Officer Jansing ran a warrant check on Redd and discovered that Redd had outstanding arrest warrants for murder, attempted murder, and robbery. As Redd sat inside the officer's patrol car, Officer Jansing requested and received confirmation of the warrants. He then arranged for the vehicle to

be impounded since he did not know who actually owned the vehicle. Officer Jansing had dispatch attempt to contact the Orange County agencies who had issued the warrants to see if they wanted any particular action taken before he had the vehicle impounded. Eventually, someone from a sheriff's office was contacted and Officer Jansing was told to impound the vehicle per his regular procedure. A towing agency was called to impound the car. (1 R.T. pp. 48-50.)

At some point, Officer Jansing conducted an inventory search of the vehicle. When asked what his purpose was in doing so, the officer stated that his department policy required him to do so for several reasons, mainly liability, i.e., it was necessary to inventory anything of value in case they were later claimed to be missing. He then explained that his department's procedures required him to conduct a full inventory of the vehicle including any compartments, closed containers, the trunk, the exterior of the vehicle; note any damage to the tires, broken glass, or any damage to the interior or exterior of the vehicle.[8/] (1 R.T. pp. 50-52.)

Officer Jansing found weapons and ammunition inside the car. For safety reasons, he arranged to have the items placed in a secure storage area. One of Redd's outstanding warrants had been issued by the FBI, so Officer Jansing asked local FBI agents to respond to the scene. The weapons were turned over to the responding agent for safe keeping. Non-weapon items were left inside the vehicle. Officer Jansing explained that normally the towing company would have taken the vehicle directly to its impound lot. However, it was decided the car should be placed in a more secure area, in case anyone from Orange County had concerns about the car. The car was taken to the FBI's secure facility. Officer Jansing transported Redd to the San Francisco County Jail. (1 R.T. pp. 52-53.)

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8. The officer provided the court with a photocopy of his department's impound policy. (1 R.T. p. 51.)

At the hearing, Officer Jansing confirmed that he had received training that qualified him as a peace officer in California pursuant to Penal Code section 832.[9] Officer Jansing was assigned to the Golden Gate National Recreation Area which consisted of parks, beaches, and areas of the city which contained "pockets of park land." On the date Redd was arrested, Officer Jansing was authorized to act as a peace officer in San Francisco. He explained that San Francisco, Marin, and San Mateo counties provide letters of consent or authorization from the sheriff or chief of police, giving officers from Jansing's agency authority to act under Penal Code section 830.8, subdivision (b). At the time Redd was arrested, San Francisco Chief of Police Tony Ribera had issued a letter of authorization to all officers of Jansing's agency.[10] (1 R.T. pp. 54-56.) Officer Jansing explained that he was "assigned to the northern end of the Golden Gate National Recreation Area, which is Aquatic Park and Fort Mason, those areas," and that the car Redd was sitting in "was in an area known as Gas House Cove." The car was "probably about a hundred yards" from the National Recreation Area, federal property. (1 R.T. pp. 41-42, 57.)

Charles Trebbien of the California Department of Corrections was Redd's parole agent from November 1993, until March 1995. According to Trebbien, on or about May 31, 1994, Redd was involved in an incident during which a security guard in the City of Orange was wounded. As a result of that incident, the next day, June 1, Trebbien submitted a request to the board of prison terms for a warrant to be issued for Redd's arrest. A warrant was issued that same day. (1 R.T. pp. 79-81.)

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9. A copy of the officer's certificate of completion of the course was presented to the court. (1 R.T. p. 55, Peo. Ex. 4.)

10. A copy of that letter was presented at the hearing. (1 R.T. p. 56, Peo. Ex. 5.)

Detective Jerry Brakebill, of the City of Brea, was assigned to investigate the homicide that took place at the Alpha Beta on Yorba Linda Boulevard, on July 18, 1994. On March 7, 1995, Detective Brakebill served a search warrant in San Francisco in connection with the Alpha Beta homicide. The warrant authorized a search of a 1978 Datsun. Detective Brakebill understood that Redd had been arrested from the vehicle the previous day. In connection with executing the search warrant, the detective looked at items taken out of the car the previous evening, which were located at the FBI headquarters. (1 R.T. pp. 82-84.)

At the hearing, Detective Brakebill explained that believed he had probable cause to search the vehicle based on the warrant that had been issued for Redd's arrest for the July 18 homicide. The arrest warrant had been issued based on information Detective Brakebill had obtained from interviewing witnesses to the crime and physical evidence obtained during the investigation. Detective Brakebill believed he had probable cause to search the vehicle for a weapon used in the shooting, a wig, hat, and glasses. The detective was aware that the contents of the vehicle had already been inventoried, so he was aware of what was inside the vehicle before he searched it. The detective looked at items that had been retrieved from the vehicle the previous evening, which were located at the FBI headquarters. The detective explained that he would have searched the vehicle anyway because something might have been missed. He also wanted to photograph the items as he took them out of the vehicle, and prepare his own inventory and search warrant return. Detective Brakebill identified a search warrant return, completed by himself, that listed the items that were seized from both the vehicle and the FBI office. (1 R.T. pp. 82-87.)

Redd testified on his own behalf. On March 6, 1995, around 4:53 p.m., Redd was in the area of Gas House Cove area in San Francisco, sitting in his car, a Datsun, which he had purchased in early December 1994. At some point,

Officer Jansing approached Redd and asked him for his registration and driver's licence. Redd gave the officer all the paperwork he had, including a "proof of service regarding a sheriff's sale and a bill of sale, . . . , from the man [he] bought [the car] from." He also gave the officer a birth certificate that bore the name Richard Redd. (1 R.T. pp. 90-91.)

The officer ran the birth certificate for warrants and to see if it matched up to a driver's license. Redd told the officer that he had a driver's license. Redd claimed that he had a wallet on his person that evening and that it was in his hand at the time the officer ran the check on the birth certificate. When asked how he lost possession of his wallet, Redd claimed that Officer Jansing said that he did not "take much stock in birth certificates for identification purposes," and "demanded" other identification. As Redd looked inside his wallet to find something that would "satisfy" the officer, the officer "snatched" the wallet out of Redd's hand and went through it "on his own volition." At some point, Redd was handcuffed. Redd claimed that his wallet was removed from his person before he was handcuffed. Redd could not recall whether his wallet was taken from him before or after he got out of the car. Redd denied that his wallet was removed from his back pocket. (1 R.T. pp. 92-94.)

On cross-examination, Redd admitted that the birth certificate he gave Officer Jansing was not his, and that he knowingly gave the officer false information.[11/] Redd admitted that he lied to the officer about his identity so he would not be arrested. Redd also admitted that, at the time of the incident, he was in violation of his parole. (1 R.T. pp. 96-98.)

Redd admitted ownership of the items found in his car including: a .380 semi-automatic handgun, numerous rounds of ammunition, the wigs, a stun

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11. Redd later admitted that he took the birth certificate from his brother's mobile home. He "borrowed" it without his brother's knowledge. (1 R.T. p. 113.)

gun, the scopes adapted for firearms, a AR-15 Colt rifle with a laser site, and a sawed-off rifle. Redd claimed he could not recall whether ski masks were in his car. Redd admitted that when Officer Jansing asked him for his driver's license, he had a California driver's license hidden in his wallet and he did not give it to the officer. (1 R.T. pp. 101-103.) When asked why, Redd replied:

> I had read in the Whittier paper that I had been named as a suspect in a shooting of a security guard, I believe that was the City of Orange, and I knew therefore that I would be arrested if somebody came upon my real driver's license. [¶] So I had that hidden in my wallet and presented a birth certificate with the name Richard Redd in lieu of that.

(1 R.T. p. 103.)

Later, Redd again admitted that he lied about his driver's license and stated that at the time of the incident, "I certainly wouldn't want to tell [the officer] I was Stephen Redd," because he had read in the paper he was wanted for an attempted murder. (1 R.T. p. 114.)

After Redd testified, the court granted defense counsel's request to introduce a five-minute long dispatch tape and a copy of the transcript of the tape. Afterwards, defense counsel briefly questioned Officer Jansing about the contents of the tape. (1 R.T. pp. 115-120.)

Subsequently, defense counsel argued that Redd had standing to challenge his detention and the search of his vehicle. (1 R.T. pp. 121-123.) Defense counsel then addressed the tape recording of Officer Jansing's call to dispatch and asserted, based on the timing of the end of the call,

> It's clear that a very, very short time passes - - in fact we time it at 26 seconds, that when Officer Jansing then again goes to 8-Charley-1 and a new conversation begins in which now Officer Jansing knows the defendant's first name is Stephen. [¶] What that means is the officer testified that he received that information after removing defendant's wallet after he had handcuffed him and that he found that out from the California driver's license. [¶] It would seem that 26 seconds . . . is contrary to the officer's testimony that after he received the information approximately 30 seconds passed, then he asked Mr. Redd out of the car, then he would have handcuffed him with the hands behind the back,

> then he removed the wallet. [¶] In other words, what it does is it corroborates Mr. Redd's version, that the wallet was actually taken from his hand as he sat in the vehicle or stood out of the vehicle, simply because too short a time had passed. [¶] In other words, the officer, before he had any information about any search warrants, performed an unlawful search and seizure without probable cause. [¶] With that, we believe that it would taint everything else which flowed therefrom, the information from the warrants, that information which the prosecution, after receiving the warrants, argues is their basis from why they're entitled to go into the trunk of the car and seize that evidence which comes forth.

(1 R.T. pp. 123-125.)

Defense counsel then stated it was uncontested that there was a search warrant affidavit and a *lawfully issued warrant* issued by a judge the day after Redd was arrested and the seizure was made. In an about-face, counsel then argued that the warrant was unlawful. Counsel asserted that "from that warrant, the items that were sought to be seized [were] really predicated on Officer Jansing's report," and if the information obtained from Officer Jansing was excised from the warrant, there was "no nexus between that particular vehicle and the crimes that are [sic] arrested." (1 R.T. pp. 125-126.) Defense counsel then argued:

> I don't believe the testimony that we have heard is that Officer Jansing was acting in the capacity of a federal officer on state land. It appears to the contrary, that he was acting as a San Francisco Officer, if you will, with the authority of the San Francisco Police Chief, and hence you would have needed to have proof of the impound and inventory procedures of San Francisco Police Department since the vehicle was on city land.

(1 R.T. pp. 126-127.)

The prosecutor argued that in light of the vehicle code violations and that Redd had declined to present Officer Jansing with reliable identification, Officer Jansing was authorized under the vehicle code to take Redd into custody, and that Redd was taken out of the vehicle and lawfully arrested. Pursuant to that lawful arrest, the car was properly impounded and inventoried.

The prosecutor noted that Officer Jansing "did an excellent job of explaining why it was impounded, how the impound takes place, how it did take place here, and how the vehicle was inventoried." As to the issue of Redd's wallet, the prosecutor argued that Officer Jansing was more credible than Redd. He asserted that even if Redd's wallet had been obtained before he was handcuffed, which did not make sense under the circumstances and the motivations of Redd, it was taken "at a time where the officer had probable cause to arrest [Redd] because [Redd] declined to give any sort of reliable identification." Thus, in light of the vehicle code violation, the officer had authority to arrest Redd, and Redd's wallet was searched incident to a proper arrest. (1 R.T. pp. 127-129.) The prosecutor continued:

> everything basically flows from there because when the true identity is found, the warrants are discovered, and he's properly arrested based on those warrants. [¶] The vehicle could be impounded and inventoried pursuant to the arrest on the Vehicle Code violation and probably would have been impounded if that's all we had here because the officer didn't have any good evidence as to ownership of this vehicle. It certainly was not registered to this defendant. [¶] But he also had the warrants in this case, both parole and murder and robbery warrants, and the vehicle was properly impounded and inventoried pursuant to that. [¶] I think it's obvious here from his deference to Orange County and calling Orange County to determine what they wanted done to the vehicle, that that vehicle was going to be impounded and inventoried."

(1 R.T. pp. 129-130.) The prosecutor agreed that the parole search and seizure did not authorize the officer's conduct before the officer knew Redd was on parole. However, once Officer Jansing learned that Redd was in fact on parole, based on the parole warrant, a parole search and seizure, alternatively justified the search and seizure in this case. The prosecutor argued alternatively, in sum, that the inevitable discovery doctrine justified the search and seizure in this case. The court found that Redd had standing to raise the 1538.5 issues, and summarily denied the motion. (1 R.T. pp. 130-132.)

B. Standard Of Review

In reviewing a ruling on a suppression motion, an appellate court defers to all factual findings that are supported by substantial evidence. (*People v. Woods* (1999) 21 Cal.4th 668, 674; *People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Blardony* (1998) 66 Cal.App.4th 791, 794.) Where the trial court makes no express findings of fact, a reviewing court presumes all credible inferences in support of the denial of suppression. (*People v. Bishop* (1993) 14 Cal.App.4th 203, 214; *People v. Fulkman* (1991) 235 Cal.App.3d 555, 560.) The reviewing court need not agree with the ruling of the trial court, however, "[it] may affirm a trial court judgment on any basis presented by the record whether or not relied upon by the trial court." (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1; see also *People v. Saucedo* (1995) 33 Cal.App.4th 1230, 1240 ["[o]ur review is confined to the correctness or incorrectness of the trial court's ruling, not the reasons for its ruling], disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.)

Since the imposition of Proposition 8, relevant evidence that may have been "unlawfully" obtained is admissible, unless its exclusion is required by the federal Constitution. (*In re Lance W.* (1985) 37 Cal.3d 873, 890.)

C. Redd Has Forfeited Most Of His Assertions; In Any Event, The Motion To Suppress Was Properly Denied

Based on a comparative review of the grounds asserted herein and those asserted in the written suppression motion (I C.T. pp. 184-214), and at the suppression hearing (1 R.T. pp. 125-127), it is clear that most of Redd's contentions are forfeited as they were not specifically asserted below. Nonetheless, as previously stated, all of Redd's contentions appear to rest on his erroneous belief that his arrest was improper because Officer Jansing acted

beyond his jurisdiction. Redd is wrong. Indeed, regardless of the legality of Redd's initial arrest, the search of Redd's person and car were proper. Furthermore, all of Redd's contentions are meritless, and he has failed to establish that the trial court erroneously denied his suppression motion.

1. Expired Vehicle Registration

Redd contends that the circumstances of his possessing an expired vehicle registration or a "false registration" did not permit Officer Jansing to act under section 830.8, subdivision, (a)(4). (AOB 86-87; subclaim F.) To the extent Officer Jansing's conduct was not authorized under 830.8, subdivision (a)(4), such circumstance does not obviate the officer's conduct.[12/] As seen below, Redd has focused on the wrong subdivision of the statute, as Officer Jansing's conduct fell within the confines of section 830.8, subdivision (a) (1).

Section 830.8 describes the situations in which federal employees may act as California peace officers.

Penal Code section 830.8, subdivision (a) states that:

> Federal criminal investigators and law enforcement officers are not California peace officers, but may exercise the powers of arrest of a peace officer in any of the following circumstances: [¶] (1) Any circumstances specified in Section 836 . . . for violations of state or local laws.

Section 836 subdivision (a)(1) states:

> A peace officer may arrest a person in obedience to a warrant, or, pursuant to the authority granted to him or her by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, without a warrant, may arrest a person whenever any of the following circumstances occur:

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12. Section 830.8, subdivision (a)(4) confers state peace officer authority on federal employees only "[w]hen probable cause exists to believe that a public offense that involves immediate danger to persons or property has just occurred or is being committed." The offenses for which Redd was initially arrested do not fall in such category.

[¶] (1) The officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence.

Based on the evidence, Officer Jansing performed his legitimate investigative function. Officer Jansing noticed a suspicious registration tag on the license plate of a car parked in the area he was patrolling. Officer Jansing ran a DMV check on the vehicle and discovered that the car's registration had actually expired a year earlier. Subsequently, Officer Jansing contacted Redd who was seated in the car. Redd gave the officer a birth certificate as proof of his identification, and claimed that he a valid driver's license in the name on the birth certificate he produced. A records check revelaed that no driver's license had been issued in the name and birth date exhibited on the birth certificate. Believing Redd had provided him with false information, Officer Jansing placed Redd under arrest for not having a driver's license in his possession, providing a false name, and the vehicle registration violation. (1 R.T. pp. 45-47.)

Clearly, under the above facts, Officer Jansing was authorized to effectuate Redd's arrest based on the plain language of section 830.8, subdivision (a)(1). Contrary to Redd's assertion (see AOB 87), the circumstance of what appeared to be a fraudulent registration tag on Redd's license plate gave Officer Jansing reasonable cause to contact and detain Redd. When Redd failed to produce a valid driver's license and gave the officer what appeared to be false identification, Officer Jansing's suspicion escalated to probable cause to arrest Redd. (*People v. Hamilton* (2002) 102 Cal.App.4th 1311, 1317.) As pointed out by the prosecutor, "when someone's committed a violation of the vehicle code, be it a felony or infraction, the officer has the authority to arrest that person." (1 R.T. p. 129.) Officer Jansing in fact had probable cause to arrest Redd for all three public offenses committed in his presence, the status of which was of no consequence. (*People v. McKay* (2002) 27 Cal.4th 601, 607 ["nothing inherently unconstitutional about effectuating

arrest for a fine-only offense."]; see *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 323 [121 S.Ct 1536, 149 L.Ed.2d 549].)

Alternatively, Officer Jansing was equally authorized to arrest Redd upon discovery of Redd's outstanding arrest warrants pursuant to section 830.8. In short, assuming Redd's arrest for the traffic violations was improper, it is inconceivable that Officer Jansing would have set Redd free after learning Redd had several outstanding arrest warrants. (*See United States v. Green* (7th Cir. 1997) 111 F.3d 515, 521 ["It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant--in a sense requiring an official call of "Olly, Olly, Oxen Free."].) In which case, a subsequent search of Redd's car would still have been justified. (*Ibid.*) Simply put, Officer Jansing acted well within his jurisdiction, and Redd's claim to the contrary must fail.[13/]

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13. The only authority relied on by Redd in support of this contention is an attorney general's opinion. (See AOB 86-87, citing Ops. Cal. Atty. Gen. 297, 1997 WL 665475, (Cal.A.G.).) While opinions of the Attorney General may be persuasive, they are not binding on this Court. (*State of Cal. ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 71.) The opinion is not applicable to this case. It appears to have been written in response to specific questions about section 830.8 in relation to an *unknown factual situation*, and contemplates the statute "with respect to the arrest of persons and the search of property *pursuant to a warrant*." (See Ops. Cal. Atty. Gen. 297, 1997 WL 665475, *3-6 (Cal.A.G.).) Here, Redd was subject to a lawful *warrantless* arrest. Although not addressed by Redd, respondent notes the opinion suggests that the federal officers in that case could not take action to enforce state or local law while away from federal property for "offenses committed in their presence that do not pose a threat to person or property even though an immediate response is necessary to prevent escape." (See Ops. Cal. Atty. Gen. 297, 1997 WL 665475, *3-6 (Cal.A.G.).) That interpretation of the statute appears flawed.

In construing a statute, this Court looks to "the plain meaning of the statutory language, giving the words their usual and ordinary meaning. [Citation.] If there is no ambiguity in the statutory language, its plain meaning controls; [and this Court] presume[s] the Legislature meant what it said. [Citation.]" (*People v. Yartz* (2005) 37 Cal.4th 529, 537-538.) No ambiguity

2. Location Where Redd Was Contacted

Redd alternatively contends that Officer Jansing did not have authority to act at the location were he contacted Redd. (AOB 87-90; subclaim G.) Specifically, Redd argues that the parking lot in which he was arrested was "not 'adjacent to' federal property." (See AOB 87.) This assertion was not proffered below, so it is forfeited. (*People v. Champion* (1995) 9 Cal.4th 879, 918 [in order to preserve an issue for appeal, there must be an objection on a specific basis].) Nonetheless, it should be rejected.

Section 830.8, subdivision (b) states:

> Duly authorized federal employees who comply with the training requirements set forth in Section 832 are peace officers when they are engaged in enforcing applicable state or local laws on property owned or possessed by the United States government, *or on any street, sidewalk, or property adjacent thereto*, and with the written consent of the sheriff or the chief of police, respectively, in whose jurisdiction the property is situated.

In *Sonora Elementary School District v. Tuolumne County Board of Education* (1966) 239 Cal.App.2d 824, the court had to determine whether a school district was "adjacent", as used in the statute in question, to a national forest such that the school district would be entitled to a portion of forest reserve school funds. Noting that the nearest point of school district boundary was within *one-half mile*[14] of the edge of the national forest, the court stated,

> A frank review of the evidence leads to the conclusion that the school district is 'adjacent' to the forest, as found by the trial court, unless one should conclusively adopt the occasional inaccurate definition that adjacent means 'contiguous,' 'adjoining,' or 'touching.'

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exits in the statutory language of section 830.8.

14. One-half mile is equal to 880 yards. One mile equals 1760 yards. (*The Random House College Dict.* (revised ed. 1984) p. 847.)

(*Id.* at p. 826-827.) Concluding that adjacent was better defined as meaning 'neighboring' or 'near to' or 'close by,'[15] the court held that the school district property was adjacent to the national forest. (*Id.* at p. 829.)

At the suppression hearing, Officer Jansing testified that the car Redd was sitting in "was in an area known as Gas House Cove," and the car was "probably about a hundred yards," from the National Recreation Area, federal property.[16] (1 R.T. pp. 41-42, 57.) The evidence presented at the hearing, in conjunction with above authority, clearly demonstrates that Officer Jansing contacted Redd in an area "adjacent" to federal property within the meaning of section 830.8, subdivision (b). Redd's claim to the contrary should therefore be rejected.

3. Certification Of Arresting Officer

Redd next asserts that the People failed to establish that Officer Jansing was properly certified by the head of his agency. (AOB 91; subclaim H.) This contention was not asserted below, so it too is forfeited. (*People v. Champion*, *supra*, 9 Cal.4th at p. 918.) Moreover, this assertion quibbles with the facts.

With respect to subdivisions (a) (1) through (4) of section 830.8, the

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15. Redd proffers a nearly identical definition in his Opening Brief. (See AOB 88.)

16. In an attempt to establish the exact location of his car when he was arrested, Redd relies on material outside the record, i.e., proffered maps (see AOB 88, fns. 6 & 7), which he requests this Court to take judicial notice. As this issue was not raised below, that material was never presented to the trial court for its consideration. This Court should therefore decline to consider the material. (*People v. Fairbanks* (1998) 16 Cal.4th 1223, 1249, ["we cannot consider on appeal evidence that is not in the record"], citing *In re Carpenter* (1995) 9 Cal.4th 634, 646; see also *People v. Jarrett* (1970) 6 Cal.App.3d 737, 738 ["under well established appellate rules, this court need not consider issues not raised at trial and may not properly consider alleged facts which are wholly outside the record on appeal"].)

statute states,

> In all of these instances, the provisions Section 847 shall apply. These investigators and law enforcement officers, prior to these arrest powers, shall have been certified by their agency heads as having satisfied the training requirements of Section 832, or the equivalent thereof.

At the hearing, it was demonstrated that Officer Jansing satisfied the training requirements of section 832 based on the training he received that qualified him as a peace officer in California pursuant to the statute. A copy of the officer's certificate of completion for the training course he took at a junior college was presented at the hearing. (1 R.T. p. 55.) Although the certificate was not specifically issued by the head of the officer's agency, there is no question that Officer Jansing was properly certified to act under the statute, especially in light of the fact that defense counsel did not question the officer's qualifications at the hearing (see 1 R.T. pp. 54-79). "To determine otherwise [now] would be quibbling with the facts." (*See e.g. People v. Franco* (1970) 4 Cal.App.3d 535, 540, citations omitted.) Thus, this assertion should be rejected.

4. Authority To Use Marked Police Vehicle And Police Radio

Redd next argues that Officer Jansing did not have authority to use a "marked police vehicle" or his "police radio." (AOB 92; subclaim I.) Because it was not asserted below, this claim is forfeited. (*People v. Champion, supra*, 9 Cal.4th at p. 918.) In support of this claim, Redd again relies solely on the former attorney general's opinion discussed in the previous argument. As previously argued, that opinion carries no persuasive weight as it rests with a flawed premise. Within the opinion, after it was determined that the federal officers in question where "not peace officers as that term [was] defined in sections 830-832.90," it was therefore suggested that, because section 830.8 was silent on the subject, the federal officers could not use marked police

vehicles or other emergency equipment when enforcing state or local laws. (See Ops. Cal. Atty. Gen. 297, 1997 WL 665475, * 6-7 (Cal.A.G.).)

In this case, as argued above, Officer Jansing was a duly authorized peace officer as defined in section 830.8, subdivision (a)(1) and (b). Although the statute is silent as to the manner in which an officer may exercise his or her duly authorized power, to interpret the statute as precluding Officer Jansing from using his police car or radio to assist him in his legitimate law enforcement duties, would lead to an absurd result. Consequently, this claim should be rejected.

5. Private Citizen Status

Redd argues that Officer Jansing did not act as a private citizen. (AOB 98-108; subclaims K & L.) In support of this assertion, without citing to the record, Redd states, "At trial, the government argued that if Officer Jansing was outside his jurisdiction, he was acting as a private citizen, and thus his actions were completely immune from the remedy of suppression." (AOB 98.) Redd did not raise this contention below, so it has been forfeited. (*People v. Champion, supra*, 9 Cal.4th at p. 918.) Moreover, the record indicates that no such argument was asserted by the prosecutor at the suppression hearing. (See 1 R.T. pp. 121-132.) However, in a footnote in the prosecutor's written motion in opposition to Redd's motion to suppress, the prosecutor pondered whether if Officer Jansing were not considered a peace officer when he contacted Redd, did he act as a private citizen? If so, the officer's conduct would not be the subject of the Fourth Amendment. (See I C.T. p. 219, fn. 1.)

Should this Court determine that Officer Jansing acted beyond his jurisdiction, as asserted by Redd in section 1, *ante*, then, by default the officer necessarily acted as a private citizen. "A police officer's authority is normally limited to the boundaries of the jurisdiction for which he is appointed. When

he acts outside his jurisdiction he is generally acting as a private person." (*People v. Rogers* (1966) 241 Cal.App.2d 384, 387-388; *People v. Monson* (1972) 28 Cal.App.3d 935, 940; *People v. Martin* (1964) 225 Cal.App.2d 91, 94.) Redd concedes this when he states, "[The officer] possessed at most the rights of a private citizen to detain and arrest." (See AOB 107.) However, contrary to Redd's assertion (see AOB 107), as a private citizen Officer Jansing had probable cause to detain and arrest Redd.

Section 837 states: "A private person may arrest another: [¶] 2. When the person arrested has committed a felony, although not in his presence." Case law recognizes that "there is no dispute that placing a stolen registration sticker on a license plate, with intent to defraud, is a felony violation of California law." (*United States v. Mayo* 394 F.3d 1271, 1276 (9th Cir. 2005, citing Cal. Veh. Code § 4463.) Thus, if it is determined that Officer Jansing acted beyond his jurisdiction, the result is that he acted as a private citizen, in which case his conduct was not subject to the Fourth Amendment. It is well established that the Fourth Amendment's prohibition against unreasonable searches and seizures is inapplicable to private citizens. (See e.g., *Walter v. United States* (1980) 447 U.S. 649, 656 [100 S.Ct. 2395, 65 L.Ed.2d 410], citing *Burdeau v. McDowell* (1921) 256 U.S. 465 [41 S.Ct. 574, 65 L.Ed. 1048]; see also *People v. Wharton* (1991) 53 Cal.3d 522, 579; *People v. North* (1981) 29 Cal.3d 509, 514.) Consequently, this assertion affords Redd no basis for relief.

6. Validity Of *People v. McKay*

Redd asserts that this Court's decision in *People v. McKay*, *supra*, 27 Cal.4th 601, is incorrect. (AOB 108; subclaim M.) Essentially, Redd argues that this Court misinterpreted the United States Supreme Court's decision in *Atwater v. City of Lago Vista*, *supra*, 532 U.S. 318. (See AOB 108-112.) This contention is forfeited since it was not asserted below. (*People v. Champion*,

supra, 9 Cal.4th at p. 918.) In any event, Redd proffers nothing to justify departure from the above authority.

7. Probable Cause To Seize Wallet

Next, Redd argues that Officer Jansing did not have probable cause to seize Redd's wallet before he arrested Redd. In support thereof, Redd states, "This Court should accept [his] version of the facts over Jansing's." (AOB 114-115; subclaim O.) Redd then criticizes select portions of Officer Jansing's testimony that are unrelated to the circumstances of how Redd's wallet was obtained (see AOB 115), then merely states that Officer Jansing was not credible. (See AOB 117.) This contention was not raised below so it is forfeited. (*People v. Champion*, *supra*, 9 Cal.4th at p. 918.) In any event, this contention is meritless.

As demonstrated above, Redd's person was properly searched incident to his lawful arrest. Redd's reliance on *Taylor v. Maddox* (2004) 366 F.3d 992, is of no assistance. This is simply not a case in which the lower court failed to consider, or even acknowledge, a witnesses *highly probative testimony* that cast serious doubt on the state-court fact-finding process, thus compelling the conclusion that the lower court's decision was based on an unreasonable determination of the facts. (*Taylor v. Maddox, supra*, at p. 1005.)

Based on the evidence presented at the suppression hearing, including Redd's admission that he could not recall whether his wallet was taken from him before or after he got out of the car, and that he knowingly provided false information to the officer, clearly Officer Jansing was more credible. It may be inferred that the trial court decided as much when it summarily denied Redd's motion.

> "'The power to judge the credibility of witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal, all presumptions favor the exercise

of that power. . . .' [Citations.]"

(*In re Arturo D.* (2002) 27 Cal.4th 60, 77.) Simply put, this assertion must also fail.

8. Inventory Search Of Car

Redd asserts that Officer Jansing's inventory search of the car was improper, specifically because Officer Jansing was required to comply with the city of San Francisco's inventory search policy and the government failed to prove that the city had a proper inventory search policy. (AOB 118-120; subclaim P.) This assertion is unfounded.

It is settled that once a vehicle is impounded, the police may conduct an inventory search. (*People v. Green* (1996) 46 Cal.App.4th 367, 373.) Inventory searches are a well defined exception to the warrant requirement of the Fourth Amendment. (*Colorado v. Bertine* (1987) 479 U.S. 367, 371 [93 L.Ed.2d 739, 107 S.Ct. 738]; *People v. Williams* (1999) 20 Cal.4th 119, 126.) Inventory searches do not require probable cause. (*Whren v. United States* (1996) 517 U.S. 806, 811-812 [135 L.Ed.2d 89, 116 S.Ct. 1769]; *People v. Valenzuela* (1999) 74 Cal.App. 1202, 1208.)

The inventory search conducted by Officer Jansing was proper. After Officer Jansing arrested Redd and learned Redd's true identity, he discovered Redd had several outstanding arrest warrants. The officer arranged for Redd's vehicle to be impounded. (1 R.T. pp. 48-50.) At the suppression hearing, Officer Jansing stated that, at some point, subsequent to Redd's arrest, he conducted an inventory search of Redd's vehicle. When asked what his purpose was in doing so, the officer explained that his department policy required such of him, mainly for liability reasons. Per his department's procedures, Officer Jansing was required to conduct a full inventory of the vehicle including any compartments, closed containers, the trunk, the exterior

of the vehicle, and the noting of any damage to the tires or broken glass, or any damage to the interior or exterior of the vehicle. Officer Jansing found weapons and ammunition in the car. He arranged to have local FBI agents place the car in a secure storage area and he turned the weapons over to them for safe keeping. The non-weapon items were left inside the car. (1 R.T. pp. 50-53.)

On cross-examination, defense counsel asked Officer Jansing why he used his own department's impound policy to inventory the car when he was on city ground. Officer Jansing replied, "That policy applies to all officers, regardless of the property they're on, as long as they're in the course of their official duties, impounding a vehicle pursuant to their arrest authority." (1 R.T. pp. 73-74.)

Under the above circumstances, the inventory search conducted by Officer Jansing was proper. Redd's assertion that Officer Jansing was required to conduct the inventory search pursuant to the policies of the San Francisco City police and that the People failed to prove the city had a proper inventory search policy, should be rejected. Redd has offered no authority, nor had respondent located any, which states that the officer was required to follow any policy other than his own agencies inventory policy. Therefore, this assertion should be rejected.

9. Search Incident To Arrest

Equally unfounded is Redd's complaint that the search of his car was not justified as incident to his arrest. (AOB 120-122; subclaim Q.) It is well settled that an arresting officer may make a warrantless search incident to arrest, limited to that area an arrestee might reach to remove weapons and to prevent concealment or destruction of evidence. (*Chimel v. California* (1969) 395 U.S. 752, 763, 23 L.Ed.2d 685, 89 S.Ct. 2034.) In *New York v. Belton* (1981) 453

U.S. 454, 69 L.Ed.2d 768, 101 S.Ct. 2860, the United States Supreme Court applied the fundamental principle of *Chimel* to a car search upon arrest of a motorist. The *Belton* Court held that when a person is lawfully arrested in a car, the entire interior of the car is an "area within the immediate control of the arrestee" and hence can be searched incident to arrest. (*New York v. Belton, supra*, 453 U.S. at p. 460; *People v. Mitchell* (1995) 36 Cal.App.4th 672, 674; *People v. Stoffle* (1991) 1 Cal.App.4th 1671, 1678-1681.) The *Belton* decision had nothing to do with probable cause to believe that some seizable item may be found in the car. A search incident to a lawful arrest requires no additional justification. (*Ibid.*)

In light of such well-established authority, Redd's complaint that neither Officer Jansing or Detective Brakebill were justified in searching Redd's car, which is founded entirely on Redd's erroneous assertion that Officer Jansing had to have "probable cause to believe the automobile contained contraband" (see AOB 121), should be summarily rejected.

10. Parole Search Of Car

Redd also argues that the search of his car could not be justified by his parole status because "neither Jansing nor Brakebill testified that they knew of Redd's parole status." (AOB 122; subclaim R.) This contention was not raised below so it is forfeited. (*People v. Champion*, *supra*, 9 Cal.4th at p. 918.) In any event, the record demonstrates that a parole search would have been justified.

Case law states that if "officers conduct a warrantless search unaware of a parole search condition, the condition cannot be used to make the search valid." (*People v. Ramos* (2004) 34 Cal.4th 494, 505, fn. 3, citing *People v. Sanders* (2003) 31 Cal.4th 318, 333.) That is not the case here. When Officer Jansing learned that Redd had several outstanding warrants, he noted that

included a parole warrant. (1 R.T. p. 73.) Although the officer did not specifically testify that he knew Redd was on parole, his knowledge of such may be inferred from the circumstances. Furthermore, the record demonstrates that Officer Jansing did not search Redd's car prior to learning that Redd had an outstanding parole warrant. (See 1 R.T. pp. 48-50.)

There is no evidence Redd was contacted for arbitrary or capricious reasons or for purposes of harassment. As previously argued, Officer Jansing preformed his legitimate investigatory function when he contacted Redd for what he perceived to be violations of the Vehicle Code. Thus, as pointed out by the prosecutor, a parole search and seizure would have alternatively justified the search and seizure in this case (see 1 R.T. p. 130). (*People v. Reyes* (1998) 19 Cal.4th 743, 751 [upholding parole search unsupported by reasonable suspicion].) This contention should therefore be rejected.

11. Brakebill's Search Warrant

Redd next complains that "the illegal search tainted the subsequent warrant." Redd asserts, "Brakebill admitted that he had Jansing's report in his possession before he drafted the affidavit in support of the warrant." (AOB 122-123; citing 1 R.T. pp. 88-89.) Redd then argues essentially that, in sum, without Jansing's report, the warrant affidavit contained insufficient evidence to justify a search of the car. (AOB 122-123, subclaim S.) Respondent submits that this claim has been forfeited in light of the fact that, at the suppression hearing, defense counsel initially conceded that "there was a search warrant affidavit and a *lawfully issued warrant* issued by a judge the day after Redd was arrested and the seizure was made." (1 R.T. p. 125.)

Nonetheless, the belated and forfeited assertion is completely unfounded. As previously argued, Officer Jansing searched Redd's car incident to a proper arrest. Furthermore, Redd assumes that Detective Brakebill relied solely on

Officer Jansing's police report in filing out the affidavit for the search warrant. The record indicates he did not. Indeed, when questioned about Officer Jansing's report on cross-examination, Detective Brakebill merely stated that he believed the report was faxed at some point, he did not recall what day he received the report. When asked if he attached the report to his affidavit, Detective Brakebill stated he could not recall whether or not it was attached. (See 1 R.T. pp. 88-89.)

Moreover, on direct examination Detective Brakebill stated that he believed that he had probable cause to search Redd's car based upon information he had obtained "from interviewing witnesses to the crime as well as some physical evidence that was obtained during the investigation which led to the arrest warrant for [Redd]." (1 R.T. 86.) Consequently, these facts do not even suggest that Detective Brakebill relied on Officer's Jansing's report in drafting the warrant affidavit, therefore this claim must fail.

12. Trial Court's Supervisory Powers

Redd contends that the trial court should have used it's "supervisory powers" to exclude the evidence because Officer Jansing "wilfully disobeyed the law," and "in fact engaged in flagrant misconduct." (AOB 123-124; subclaim T.) This contention is forfeited because it was not asserted below. (*People v. Champion*, *supra*, 9 Cal.4th at p. 918.) Nonetheless, Redd proffers absolutely no, nor does the record contain any, evidence that remotely suggests that Officer Jansing engaged in any misconduct. To the extent Redd argues the officer committed misconduct because he allegedly acted beyond the scope of his jurisdiction, as argued above, Officer Jansing acted well within his jurisdictional authority. Consequently, this completely unfounded contention must be rejected.

13. Prejudice

Redd asserts that the admission of evidence seized from the car was prejudicial. (AOB 125-126; subclaim U.) This contention is forfeited because it was not asserted below. (*People v. Champion*, *supra*, 9 Cal.4th at p. 918.) In support thereof, Redd notes that "even the trial judge recognized" this at sentencing when he noted, "the record should be clear that it's tough to take on witnesses when there's physical evidence that puts the gun that's in your possession to the crimes involved." (AOB 125; see 17 R.T. p. 3374.) Redd's assertion misses the mark. The issue here is whether the evidence was improperly admitted as a result of the trial court's erroneous denial of the suppression motion. As demonstrated above, it was not. "[T]hat the evidence [Redd wanted suppressed] was potentially damaging did not thereby make it unfairly prejudicial." (*People v. Ochoa* (1998) 19 Cal.4th 353, 451, citing *People v. Gionis* (1995) 9 Cal.4th 1196, 1214 ["[A]ll evidence which tends to prove guilt is prejudicial . . . ."].) Thus, this contention must also be rejected.

In sum, because none of the grounds asserted by Redd herein demonstrate that the trial court erred in denying the motion to suppress, this entire claim must fail.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING REDD'S UNTIMELY MOTION FOR A LINEUP

Redd claims that the trial court erred in denying his motion for a lineup. (AOB 127-136.) This claim must fail as the trial court properly denied Redd's untimely request for a lineup.

"Due process requires in an appropriate case that an accused, upon *timely* request therefor, be afforded a pretrial lineup in which witnesses to the

alleged criminal conduct can participate." (*Evans v. Superior Court* (1974)11 Cal.3d 617, 625, emphasis added.) The right to a lineup exists, "only when eyewitness identification is shown to be a material issue *and* there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." (*Ibid.*, emphasis added.) Whether a lineup is required is a determination "within the broad discretion" of the trial court. (*Ibid.*) A motion for a pretrial lineup should be made as soon after arrest or arraignment as is practicable, and an unexplained delay in making the motion may constitute grounds for denial. (*Id.* at p. 626; accord, *People v. Baines* (1981) 30 Cal.3d 143, 147-148.) "[M]otions which are not made until shortly before trial should, *unless good cause* is *clearly demonstrated*, be denied in most instances by reason of such delay." (*Evans v. Superior Court, supra*, 11 Cal.3d at p. 626, emphasis added.) The *Evans* timeliness requirement was reaffirmed in *Baines*, which upheld the trial court's denial of a request for a lineup that was made approximately 90 days after the offense was committed and 60 days after the preliminary hearing was held. (*People v. Baines, supra*, 30 Cal.3d at pp. 147-149.)

Here, the offense in count 2, for which Redd had requested a lineup, was committed on or about March 13, 1994. (I C.T. p. 266.) Redd was arrested on March 6, 1995. (1 R.T. pp. 48-49, 94.) The preliminary hearing was held on June 9, 1995. (I C.T. pp. 6-82.) Redd's motion for a pre-trial lineup was filed on July 19, 1995 (see I C.T. pp. 121-127), and the hearing for that motion was held on August 16, 1996.

Defense counsel candidly admitted "there were opportunities between the time of that preliminary hearing and today to request a lineup." (1 R.T. pp. 28, 32.) Defense counsel argued it was not practical to request a lineup at an earlier point in time. (See 1 R.T. pp. 24-25.) He also argued the delay in his request did not affect anything. (*Id.* at p. 25.) The defense argued that the

witnesses' tentative identification was the only evidence linking Redd to that particular crime. (*Id.* at p. 28.)

The prosecutor disagreed with defense counsel's assertion that it was not practicable to request an earlier lineup and noted that the preliminary hearing had been conducted 14 months prior, in June 1995. The prosecutor argued that the issue of identification on the count in question should "have naturally occurred to someone in the course of that preliminary hearing," and it was "only realistic to expect" that a lineup motion should have been made at that time, "certainly not 14 months later." (1 R.T. p. 29.)

Noting defense counsel's assertion that he could not have been ready and gone through all the information in time for the preliminary hearing, the prosecutor pointed out that the lineup was held on June 6, and the preliminary hearing was held three days later, whereupon defense counsel had answered ready and the matter proceeded. Thus, it did not make sense for the defense to assert that they could not be ready for the lineup. The prosecutor also pointed out that Bugbee had picked out Redd's picture in a photographic lineup. (1 R.T. pp. 30-31.)

The court denied Redd's request for a lineup. Although the court found Bugbee to be a material witness, it could not "make a finding that there exits a reasonable likelihood of mistaken identification." (1 R.T. p. 32.) The court concluded,

> . . . there was sufficient time from the time [Redd] was taken into custody, which was March of '95, sufficient time between that date and today's date prior to today's request. And, of course, you are within about a month of the trial itself, which is another factor that *Evans* is asking the court to look at. [¶] So that's the basis of denying the request.

(1 R.T. pp. 32-33.)

Redd has failed to demonstrate that his delay in requesting the lineup was justified by good cause. In light of these circumstances, and the trial

court's clear understanding of *Evans*, it cannot be said that the trial court abused its discretion in denying Redd's motion as untimely. (*Evans v. Superior Court, supra*, 11 Cal.3d at p. 626; *People v. Baines*, *supra*, 30 Cal.3d at pp. 147-149.) Therefore, this claim must fail.

III.

REDD RECEIVED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Appellant claims that trial counsel was ineffective for "conced[ing]" his guilt as to counts 3 and 4 during the opening statement. (AOB 137-142.) This claim is meritless.

The applicable law pertaining to ineffective assistance of counsel claims is set forth in the two-part test articulated by the United States Supreme Court in *Strickland v. Washington* (1984) 466 U.S. 668, 684-687 [104 S.Ct. 2052, 80 L.Ed.2d 674]. Under this test, a defendant must show that his trial counsel's performance fell below an objective standard of reasonableness. (*Strickland v. Washington, supra*, 466 U.S. at pp. 687-688; *People v. Benavides* (2005) 35 Cal.4th 69, 93.) A defendant must also affirmatively prove that "there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra*, 466 U.S. at p. 694; *People v. Benavides, supra*, 35 Cal.4th at p. 93.) The reviewing court need not consider both whether there was unprofessional error and prejudice. It is entirely appropriate to first address the question of whether there is a lack of sufficient prejudice to the appellant and thus avoid unnecessary burdens on defense counsel. The *Strickland* Court stated that "[i]f it is easier to dispose of an effectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Id.* at p. 697.)

During opening statement, defense counsel, while discussing the Vons incident, commented that someone had noticed a man, later identified as appellant, walking in front of a karate studio in the strip mall, and "[e]ventually, after a few minutes *Mr. Redd is observed walking in front of the Vons store.*" (5 RT 930, emphasis added.) Appellant claims that the emphasized portion of that statement constituted an concession of his guilt as to counts 3 and 4.[17/] (AOB 137.) Appellant has grossly misconstrued counsel's comment.

Appellant argues that "the sole question before the jury at the time the opening statement was made was who shot the Vons security guards. The identity of the shooter was what the case was all about." (AOB 140.) However, viewing the complained of remark, in its entire context, it is clear that

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17. Additionally, citing to a *Marsden* hearing, appellant perfunctorily asserts that he "complained to the court," that counsel had conceded his guilt and the court "disregarded" his statements. (See AOB 138, citing 7 RT pp. 1257-1281.) The *Marsden* hearing transcript (MHT), reveals that the court did not disregard appellant's statements. Indeed, appellant complained that an article in the Los Angeles Times stated, "Redd's attorney's don't deny he committed a robbery or that he had a gun but said he had no intention of killing Mr. McVeigh," and that, "Mr. Mc Clellan said that Redd was indeed in the shopping center and fired several bullets toward the fleeing security guards, he was merely spraying bullets in an attempt to scare the guards away from their radios so he could escape." (MHT p. 1259.) Appellant stated that his attorneys had told the press that he had been at the shopping mall and was firing bullets. The court, in sum, told appellant that reporters only watch certain parts of the proceedings, tend to make their story as attractive as they can, and are not "always as precise as the record will show." Noting that it had heard counsel's opening statement, the court did not believe counsel had conceded anything in his case despite what was in the newspaper article. Counsel admitted he spoke to the press and stated the reporter had taken "some liberties with the opening statement which of course is of record," and that he did not concede appellant had committed the crimes. (MHT pp. 1262-1264.) Later, the court stated that defense counsel's comments during the "opening statement differ[ed] in great many particulars from the summary that's contained in the news article . . . ." (MHT p. 1280.) Consequently, appellant's assertion that the court disregarded his statements is factually belied by the record.

defense counsel committed no error. Indeed, the comment was merely a reflection of the prosecutor's claim that appellant was seen outside the Vons (see 5 RT p. 930), not an admission that appellant was in fact at the Vons. In light of appellant's defense as to counts 3 and 4-- that he was not the shooter, or, alternatively, should the jury decide he was the shooter, he lacked the requisite intent to kill (see closing argument 8 RT pp. 1644-1654), it would be completely illogical for defense counsel to "concede" appellant's guilt to those offenses. Furthermore, this claim ignores that the jury was instructed that statements of counsel are evidence. (See III CT p. 884; 8 RT p. 1689; CALJIC No. 1.02.)

Appellant has misconstrued the challenged comment and, as a result thereof, he has failed to demonstrate that the legal representation provided fell below an objective standard of reasonableness, or that he suffered any prejudice from the alleged deficiency. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 695-696.) Accordingly, this claim must fail.

IV.

THE OUT-OF-COURT IDENTIFICATIONS WERE PROPERLY ADMITTED

Redd argues that the out-of-court identifications by victim/witnesses Bugbee, Shabakhti, and Rambo, were admitted in violation of *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], and Evidence Code section 1238. (AOB 143-155.) Counsel made absolutely no objection to the admission of Shabakhti's or Rambo's out-of-court identifications and his objections to Bugbee's statements were made on other grounds. Therefore, this entire claim is forfeited. A defendant may not complain for the first time on appeal that the admission of evidence violated the right to confrontation, or any other right under the federal Constitution. (*People*

v. Boyette (2002) 29 Cal.4th 381, 424 [due process, reliable penalty determination, and cruel and unusual punishment]; *People v. Alvarez* (1996) 14 Cal.4th 155, 186 [confrontation]; *People v. Zapien* (1993) 4 Cal.4th 929, 979-980 [confrontation]; *People v. Raley* (1992) 2 Cal.4th 870, 892 [confrontation and due process].) The Supreme Court's decision in *Crawford* does not change the fact that Redd has waived his constitutional claim. *Crawford* merely applied the Confrontation Clause. The decision did not create a new constitutional right which was not in existence at the time of Redd's trial. As such, if Redd wanted to object on the specific ground that there was a violation of the right to confrontation, he could have done so even before *Crawford*. It remains the rule that in order to preserve an issue for appeal, there must be an objection on a specific basis. (*People v. Champion, supra*, 9 Cal.4th at p. 918.) In any event, the out-of-court identifications were properly admitted.

On direct examination, the prosecutor questioned Bugbee about the circumstances of the photographic lineup he viewed on or about June 16, 1994. After Bugbee verified that he had read and signed an admonishment before looking at any photographs, the prosecutor asked Bugbee if he was then able to identify the robber. Bugbee said yes. The prosecutor asked Bugbee, "Would you tell the jury who you selected and what it was that you said?" Defense counsel's objection "under section 1230 and 830, not adequate foundation," was overruled. Bugbee thereafter answered, in sum, that when he viewed the photographic lineup, he stated that the person depicted in position number three, Redd, looked "the closest by the shape of his face. If he was to put dark glasses on I would say it was him." Bugbee explained that the robber had worn dark glasses, and that when he made the identification he tried to be as accurate as possible. (5 R.T. pp. 952-957.)

Shabakhti testified that police visited him in the hospital the day after he was shot to see whether he could identify the shooter. Shabakhti verified that

he read and signed an admonishment before he viewed any photographs. The prosecutor asked Shabakhti, "After being shown a series of six photographs, were you able to focus your attention on one of those individuals?" Shabakhti replied, "Yes, one looked pretty much like who the individual was." Shabakhti verified that he was 90 to 95 percent sure that the person depicted in position number three, Redd, was the man who shot at him. "His eyes were the same." Defense counsel did not assert any objection. (5 R.T. pp. 991-995.)

Rambo was also questioned about the circumstances of her lineup identification made on or about July 21, 1994, about three days after McVeigh was killed. Rambo verified that she too read and signed an admonishment prior to looking at the lineup. The prosecutor asked Rambo, "After you looked at the photographs, did you then circle and date and put your initials on an individual who you selected as a person being either the person or similar looking to the person who had robbed you?" Rambo replied, "Yes." She then verified that she had identified the person depicted in photograph number two, as looking "very similar" to the person who robbed her. Defense counsel made no objection. (See 6 R.T. pp. 1212-1217.)

The identifications were non-testimonial because all three witnesses were present at trial and each was subject to cross-examination. (5 R.T. pp. 957-964; 997-1017; 6 R.T. pp. 1218-1238.) The Sixth Amendment and *Crawford* require nothing more. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 59, fn. 9; *California v. Green* (1970) 399 U.S. 149, 162 [90 S.Ct. 1930, 26 L.Ed.2d 489].)

As a legal matter, even if there were discrepancies regarding the out-of-court identifications by Bugbee, Shabakhti, and Rambo, the recognized legal remedy was not exclusion, but cross-examination. Inconsistencies in a witness's testimony or a failure to recollect particular aspects of the subject of the testimony do not disqualify the witness, but present questions for the trier

of fact to decide. (See *People v. Mincey* (1992) 2 Cal.4th 408, 444.) There is simply no general impediment in state or federal law to the admission of testimony of a witness on account of doubts about the witness's credibility where the witness testifies and is fully exposed to cross-examination. (See *Crawford v. Washington*, *supra*, 541 U.S. at p. 59.)

Consequently, the admission of the out-of-court identifications did not violate the Confrontation Clause. (*People v. Hayes* (1990) 52 Cal.3d 577, 610; *Crawford v. Washington, supra*, 541 U.S., at p. 59, fn. 9; *California v. Green, supra*, 399 U.S. at p. 162.) Nor were the out-of-court identifications erroneously admitted under Evidence Code section 1238.

Redd specifically claims that Evidence Code section 1238, subdivision (c), was not satisfied because "[n]one of the witnesses testified, prior to the introduction of the out-of-court identifications, that he or she 'made the identification and that it was a true reflection of his [her] opinion at the time.'" (AOB 152-153.) Respondent disagrees.

Evidence Code section 1238, states:

> Evidence of a statement previously made by a witness is not inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and: [¶] (a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence; [¶] (b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and [¶] (c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time.

In *People v. Boyd* (1990) 222 Cal.App.3d 541, the court held that the technical requirement of subdivision (c) was met when the witness testified that "when he made the identification, he was 75-80% certain of it." (*Id.* at p. 567.) Similarly, in this case, Bugbee testified that when he viewed the photographic lineup, the person depicted in position number three, Redd, looked "the closest by the shape of his face. If he was to put dark glasses on I would say it was

him." When Bugbee made the identification, he tried to be as accurate as possible. (5 R.T. pp. 952-957.) When Shabakhti viewed the lineup, he was 90 to 95 percent sure that the person depicted in position number three, Redd, was the man who shot at him. "His eyes were the same." (5 R.T. pp. 991-995.) When Rambo viewed the photographic line-up, she identified the person in position number two, as looking "very similar" to the person who robbed her. (6 R.T. pp. 1212-1217.) Under these circumstances, the technical requirement of subdivision (c) was satisfied. (*People v. Boyd, supra*, 222 Cal.App.3d at p. 567.)

In any event, because the application of a state's ordinary rules of evidence does not implicate the federal Constitution, any error in admitting the evidence is reviewed to determine whether there is a reasonable probability of a different outcome absent admission of the evidence. (*People v. Harris* (2005) 37 Cal.4th 310, 336.) Even if the error implicated the federal Constitution, the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. at 18, 24, 17 L.Ed.2d 705, 97 S.Ct. 824.) Here, Redd suffered no prejudice. As previously argued, all three witnesses were present at trial and subject to cross-examination. (*Crawford v. Washington, supra*, 541 U.S. at p. 59.) Therefore, this entire claim should be rejected.

V.

VICTIM IMPACT EVIDENCE WAS NOT ADMITTED DURING THE GUILT PHASE

Redd next asserts that the trial court erred in permitting the prosecutor to introduce victim impact evidence during the guilt phase. (AOB 156-158.) This claim is waived; in any event it must fail.

During the guilt phase, after questioning Shabakhti about being taken to the hospital after the shooting, the prosecutor asked Shabakhti if he suffered

"any lasting health problems" as a result of the shooting. Defense counsel's objection of "compound," was overruled. Thereafter, Shabakhti briefly testified that he continued to see a psychiatrist because of post-traumatic disorder, and that he had been permanently disabled and would never get back full function of his right arm. (5 R.T. p. 991.)

As seen above, because Redd did not object to the admission of this evidence on the ground that it was improper "victim impact evidence," this claim is waived. (*People v. Partida* (2005) 37 Cal.4th 428; *People v. Seijas* (2005) 36 Cal.4th 291, 301.) Moreover, the challenged testimony did not "amount[] to victim impact evidence." (See AOB 156.) As suggested by Redd, Shabakhti's brief comment about the long-term impact of his injuries was relevant to help establish the great bodily injury allegation charged in relation to count 3. To the extent Redd claims the testimony was cumulative in that "there had already been ample evidence presented of the injuries suffered by Shabakhti" (see AOB 157), arguably, even if such evidence were cumulative, even somewhat cumulative evidence may be admitted if relevant. (*People v. Scheid* (1997) 16 Cal.4th 1,15; *People v. Thompson* (1988) 45 Cal.3d 86, 115.) The complained of testimony was brief and highly relevant to the great bodily injury allegation in that it demonstrated the full extent of Shabakhti's injuries. Thus, the evidence was properly admitted. (*People v. Harrison* (2005) 35 Cal.4th 208, 234; see, e.g., *People v. Michaels* (2002) 28 Cal.4th 486, 532; *People v. Hart* (1999) 20 Cal.4th 546, 616; *People v. Scheid, supra*, 16 Cal.4th at p.19.)

For essentially the same reasons, any error was harmless. There is no reasonable probability that Redd would have received a more favorable result had the challenged testimony been excluded. (*People v. Partida, supra*, 37 Cal.4th at p. 439.) Accordingly, this claim must be rejected.

VI.

REDD WAS NOT ENTITLED TO INSTRUCTIONS ON SECOND DEGREE MURDER OR MANSLAUGHTER

Redd contends that the trial court erred in failing to instruct the jury on the lesser included offenses of second-degree murder and voluntary manslaughter. (AOB 159-162.) Neither instruction was supported by the evidence, and any failure to give either instruction was harmless.

A defendant has a constitutional right to have the jury determine every material issue presented by the evidence. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1007; citing *People v. Lewis*, *supra*, 25 Cal.4th at p.645.) To protect this right and the broader interest of safeguarding the jury's function of ascertaining the truth, a trial court must instruct on lesser-included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present. (*Id.* at p. 1008, citing *People v. Lewis, supra*, at p. 645.) Conversely, even on request, a trial judge has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction. (*Ibid.*) Speculation is insufficient to require the giving of an instruction on a lesser-included offense. (*People v. Mendoza* (2000) 24 Cal.4th 130, 174.)

In this case, after the defense confirmed it was not requesting instructions on any lesser included offenses as to count 7, the prosecutor, concerned that the jury might find that a robbery did not occur, explained that in every murder case he tries he asks for the lesser included instructions to "protect the record." The trial court, recognizing its duty to instruct "on lesser included offenses if there is any substantial evidence in those areas," stated it "could not find any." Therefore, the prosecutor's request for the instructions was denied. (7 R.T. pp. 1518-1519, 1522-1523.)

In support of the instant contention, Redd acknowledges that

"speculation is insufficient to require the giving of an instruction on a lesser included offense," but nevertheless argues that the prosecutor's "opinion" about what the jury would or would not find, entitled him to instructions on second-degree murder and voluntary manslaughter despite the fact the prosecution's theory was felony-murder. (AOB 160-161.) Clearly, the prosecutor's "opinion," is the quintessential speculation that is insufficient to require instruction on the lesser included offenses. (*People v. Wilson, supra*, 3 Cal.4th at p.941.)

In further support of his claim, without pointing to any facts in support of either instruction, Redd proffers that "[t]he only evidence of the robbery was the testimony of Brenda Rambo." (AOB 161.) Rambo's testimony in and of itself was sufficient to establish whether or not a robbery occurred. It is well established that the testimony of one witness, if believed, may be sufficient to prove any fact. (Evid. Code, § 411; *People v. Cuevas* (1995) 12 Cal.4th 252, 263.) Put another way, "unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) In light of Rambo's uncontested testimony describing the circumstances of the Alpha Beta incident, Redd's inability to proffer any facts which would have warranted the inclusion of the omitted instructions is of no surprise since the record is absent "of substantial evidence . . . that the killing was other than robbery murder." (*People v. Valdez* (2004) 32 Cal.4th at 73, 116, footnote omitted.)

Even assuming error, Redd is not entitled to relief because any error was harmless. Redd must show a reasonable probability that the failure to give the lesser included offense instructions "affected the outcome" of this case. (*People v. Sakarias* (2000) 22 Cal.4th 596, 621, citing *People v. Breverman* (1998) 19 Cal.4th 142, 165.) Other than a perfunctory assertion that "the error prejudiced [him]," Redd offers nothing in support of his claim.

The People's uncontested evidence established nothing less than felony-murder. The evidence of Redd's intent to rob upon entry into the store was definitive. There was no evidence to support a conclusion that the entry was made without the intent to rob, or that later developments resulted in anything other than a felony-murder. Redd entered the store with a loaded gun, approached Rambo under the guise of making a purchase, pointed his gun at her, reached over the counter-belt and pulled the money tray out of the cash drawer, then placed it on the counter belt. Redd continued to point his gun at Rambo as he took the money out of the tray. When McVeigh came to Rambo's aid and attempted to stop Redd, a struggled ensued, and Redd shot McVeigh. McVeigh fell to the floor. Redd again turned his gun on Rambo, then left. (6 R.T. pp. 1194-1198, 1201-1208.)

As pointed out by the trial court, "substantial evidence" was introduced and supported the theory of the felony murder rule, and no evidence existed to support instructions on any lesser included offenses. (7 R.T. pp. 1518, 1522-1523.) It is not reasonably probable that a jury composed of reasonable persons would have concluded that Redd committed second-degree murder or voluntary manslaughter rather than the first degree felony-murder based on the uncontested facts to the contrary. (*People v. Breverman, supra*, 19 Cal.4th at p. 162.)

VII.

THE COURT PROPERLY REFUSED TO GIVE DEFENSE COUNSEL'S REQUESTED INSTRUCTIONS

Redd contends that the trial court committed instructional error during the penalty phase. (AOB 163-174.) As demonstrated below, it is well settled that these contentions are without merit.

A. Double Counting Of Special Circumstances (AOB 165-170, Subsection E)

During the discussion of applicable jury instructions in the penalty phase, the court commented that in regards to "double counting on the special circumstances, the burglary and the robbery, . . . it appears that the law favors the People on it." Defense counsel acknowledged that current case law did not favor his argument, but nonetheless objected and asked the court to "limit it to one as a unified act." The court denied the request, but asked counsel to prepare his special instruction on that subject. (9 R.T. p. 1837.)

Citing *People v. Pollock* (2004) 32 Cal.4th 1153, Redd recognizes that "this Court has rejected the contention that multiple special circumstances that arise from a single act improperly and artificially inflate the factors in aggravation . . . ," but asks the Court to reconsider its prior ruling. (AOB 165.) The reasons for this Court's previous rejections of this claim remain sound. (*People v. Dickey* (2005) 35 Cal.4th 884, 929.) Redd has presented no justification for departing from this precedent.

B. Instruction On Single Mitigating Factor (AOB 170-173, Subsection F)

The record demonstrates that, in regards to mitigating factors, per defense counsel's request (see III C.T. p. 993), the jury was instructed as follows:

> Any of the mitigating factors, standing alone, may support a decision that death is not the appropriate punishment in this case. [¶] A single mitigating factor, which you determine to be of sufficient weight, in relation to the aggravating factors, can support a decision that death is not the appropriate punishment.

(III C.T. p. 965; 16 R.T. p. 3286.) Redd now claims that the court erred in refusing to instruct the jury that "[a] single mitigating factor is sufficient to support a decision that death is not the appropriate punishment." (AOB 170-

173, subsection F; see III C.T. p. 994.)

Similar claims have been rejected by this Court in *People v. Lenart* (2004) 32 Cal.4th 1107, and *People v. Gutierrez* (2002) 28 Cal.4th 1083. This Court has stated that, "[t]he instruction [requested in *Lenart*] is argumentative because it states that any mitigating evidence may support a sentence of life without possibility of parole, but it does not state that any aggravating evidence may support a death sentence. [Citation.]" (*Id.* at p. 1134.) Redd's proposed instruction was equally defective. Moreover, since the jurors were already instructed with CALJIC No. 8.88 (see III C.T. pp. 974-975; 16 R.T. pp. 3290-3292), which informed them that they were not merely to balance the mitigating and aggravating factors against each other and that they could assign any moral or sympathetic value they deemed appropriate to each and all factors, they were adequately informed on the weighing process of aggravating and mitigating factors. (*People v. Gutierrez, supra*, 28 Cal.4th at p.1161, citing *People v. Jackson, supra*, 13 Cal.4th at p. 1244.) Thus, this claim must also fail.

C. Instructing On Accidental Killing (AOB 173, Subsection G)

During the penalty phase, defense counsel submitted the following special instruction for the court's consideration:

> In the guilt phase of the trial, you were instructed that, in the context of the felony murder rule, if a killing occurred in the course of a statutory felony, it did not matter whether the killing was intentional, unintentional, or accidental; it still constituted first degree murder. [¶] For the penalty phase however, under factor "A," how the killing occurred may be considered and is relevant in determining whether it establishes aggravating or mitigating circumstances. [¶] An unintentional or accidental killing, even though criminal, may be considered to be a mitigating factor in the penalty phase of the case. An intentional killing may be considered to be an aggravating factor in the penalty phase of the case. [¶] What moral weight or sympathetic value you give any evidence or testimony in this regard is for each jurors individual determination.

(III C.T. p. 997.)

During discussion of the proposed instruction, the prosecutor pointed out that the instruction would have told the jury, "if they felt that it's an unintentional or accidental killing, it may only be considered as a mitigating factor." The prosecutor asserted that even an accidental killing could be considered aggravating "based on the planning that went in," and the proposed instruction would have told the jury how "to consider this type of evidence," when it could be considered aggravating or mitigating. (see III C.T. p. 997; 15 R.T. pp. 3038-3039.) Thus, the prosecutor argued, whether the killing was accidental or unintentional was "a matter for [the defense] to argue, but . . . a special instruction on [such] would [not] be fair to either side." The court agreed but differed its ruling at that time. (15 R.T. p. 3039.)

Later, the matter was readdressed. The court indicated the defense was "entitled to a special instruction as to factor A and the circumstances surrounding the taking of life, ..." After the court and defense counsel discussed the court's modifications to the proposed instruction, the prosecutor objected and argued:

> In my view, doing that, in calling the attention to the felony murder rule it makes it seem like that somehow is less of a killing now that there are different rules that apply and defense can certainly argue about these things, but he has been found guilty of special circumstance murder and I think to now bring up the felony murder rule as though it's somehow less serious, and I would ask that not been done.

(15 R.T. p. 3081.)

Shortly thereafter, the prosecutor rephrased his concern noting, in sum, that the first paragraph of the proposed instruction pointed out that in the guilt phase the jurors were told that it did not matter whether the killing was accidental or unintentional, but in the penalty phase it does matter, and argued "that's the correlary of that and I don't think that's necessarily true." The court reiterated its belief that the defense was entitled to an instruction in this area and

ultimately overruled the prosecutor's objection. (15 R.T. pp. 3082-3084.) Subsequently, the jury was given the following special instruction:

> In the guilt phase of the trial, you were instructed that, in the context of the felony murder rule, if a killing occurred in the course of a statutory felony, it did not matter whether the killing was intentional, unintentional, or accidental; it still constituted first degree murder. [¶] For the penalty phase however, under factor "A," how the killing occurred may be considered for the purpose of determining whether the circumstances of the crime constitutes and aggravating or mitigating factor. [¶] Your assessment as to the nature of the act that resulted in the killing of the victim in Count (7) may be considered, along with all the other circumstances attending your determination of first degree murder and the finding the special circumstances are true.

(III C.T. p. 970; 16 R.T. p. 3288.)

Redd now complains that the court erred in refusing to instruct the jury that an accidental killing could be considered a mitigating factor because here "a jury could well have considered that the fact that the killing was accidental had some mitigating value. . . ." (AOB 173.) As discussed below in Argument IX, there was absolutely no evidence presented at trial, by either party, that Redd killed McVeigh accidentally or unintentionally. While Redd may have relied on such theory during argument, the instant assertion ignores that the jury was instructed that argument of counsel was not evidence and that all questions of fact were to be determined only from evidence received at trial. (See III C.T. pp. 884, 964; 8 R.T. pp. 1689-1690; CALJIC Nos. 1.02 & 1.03.) It must be presumed that jurors follow the instructions given to them. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 114, fn. 14; *People v. Mooc*, *supra*, 26 Cal. 4th at p. 1234; *People v. Fletcher*, *supra*, 13 Cal.4th at p. 464.) Because Redd has failed to establish any instructional error herein, this claim should be rejected.

VIII.

REDD HAS WAIVED MOST OF HIS CLAIMS OF PROSECUTORIAL ERROR; IN ANY EVENT, THEY ARE MERITLESS

Redd claims that the prosecutor committed "numerous acts of misconduct during the guilt and penalty phases. . . ." In a section titled "Procedural Facts," Redd refers to some 35 comments and/or questions by the prosecutor. (AOB 175-185.) He then presents his specific theories of alleged error wherein he fails to provide any citation to the record or cross-reference his "Procedural Facts." (AOB 186-192.) Respondent has made every effort to adequately address Redd's arguments. However, it was often impossible to determine the specific basis of an alleged error. As shown below, Redd has waived the majority of his assertions because he failed to object on grounds of prosecutorial error below. In any event, Redd has failed to establish any prosecutorial error.[18/]

It is well established that generally a defendant may not complain on appeal of prosecutorial error "'unless in a timely fashion--and on the same ground--the defendant made an assignment of [error] and requested that the jury be admonished to disregard the impropriety.'" (*People v. Gray*, *supra*, 37 Cal.4th at p. 215, quoting *People v. Hill*, *supra*, 17 Cal.4th at p.820.) A trial court is not expected to recognize and correct all possible or arguable error on its own motion, and it is the defendant's responsibility to seek an admonition if he believes the prosecutor has "overstepped the bounds of proper comment, argument, or inquiry." (*Ibid.*, quoting *People v. Visciotti*, *supra*, 2 Cal.4th at p.

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18. Respondent notes that Redd refers to several comments to which defense counsel objected and the objection sustained. As to those comments, Redd suffered no prejudice. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 943 [generally, a party is not prejudiced by a question to which an objection has been sustained]; *People v. Johnson*, *supra*, 109 Cal.App.4th at p. 1236.)

79.) "In the absence of a timely objection, [a] claim [of prosecutorial error] is reviewable only if an admonition would not have otherwise cured the harm caused by the misconduct." (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1146; *People v. Boyette*, *supra*, 29 Cal.4th at p. 432; *People v. Coddington*, *supra*, 23 Cal.4th at p. 595, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.) This requirement extends to assignments of misconduct based on the federal constitution. (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1242, fn. 20 [failure to object on the basis of any federal constitutional provision waives claim that misconduct violated the constitution]; see also *People v. Hart*, *supra*, 20 Cal.4th at p. 617, fn. 19 .) As seen below, Redd has forfeited the majority of his assertions herein due to his failure to interpose timely and specific objections below. Should this Court find Redd's assertions are not forfeited because an objection would have been futile (see AOB 191, subclaim J), they are nevertheless without merit. (*People v. Boyette, supra*, 29 Cal.4th at p. 432.)

"Improper remarks by a prosecutor can '"so infect [] the trial with unfairness as to make the resulting conviction a denial of due process."' (*People v. Earp*, *supra*, 20 Cal.4th at p. 858, quoting *Darden v. Wainwright*, *supra*, 477 U.S. at p. 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. at p. 642; cf. *People v. Hill*, *supra*, 17 Cal.4th at p. 819; and citing *People v. Frye*, *supra*, 18 Cal.4th at p. 969; see also *People v. Smithey*, *supra*, 20 Cal.4th at p. 960.) A prosecutor's conduct violates a defendant's constitutional rights only when the behavior comprises a pattern of conduct so egregious as to infect the trial with such unfairness as to make the conviction a denial of due process. Conduct that does not render the criminal trial itself fundamentally unfair may be prosecutorial misconduct only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. The burden of proof is on the defendant to show the existence of such misconduct.

(*People v. Smithey, supra,* at p. 960; *People v. Ochoa, supra*, 19 Cal.4th at pp. 427-432; *People v. Hill, supra*, 17 Cal.4th at p. 819; *People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Gionis, supra*, 9 Cal.4th at pp.1214-1215.) Redd has failed to meet his burden.

Indeed, none of the alleged errors were so egregious that they denied Redd due process. (*People v. Smithey, supra*, 20 Cal.4th at p. 960, citing *People v. Samayoa, supra*, 15 Cal.4th at p. 841, internal quotations omitted; see also *People v. Morales, supra,* 25 Cal.4th at p. 44.) Moreover, any federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Redd first contends that by "continually repeating that he was waiting to see what the defense would be, the prosecutor shifted the standard of proof onto the shoulders of the defense." Without citing to the record, Redd proffers "the court actually recognized this, and gave a half-hearted admonition as to the burden of proof, but at no point informed the jury that the prosecutor was misstating the law." (AOB 186, subclaim C.) Thereafter, Redd fails to specifically identify the comment(s) challenged in relation to this assertion. (AOB 186-187.)

Within Redd's "Procedural Facts" section, three remarks appear to be related to this claim. During closing argument, in the guilt phase, in reference to the opening statements, the prosecutor stated, without objection, "Now, the defense after I sat down made an opening statement and I was listening very carefully during their opening statement because I wanted to hear what was their defense in this case." (8 R.T. p. 1580.) Later, the prosecutor pointed out that the witnesses were able to identify Redd. Thereafter he stated, "So I think the defense is going to say he didn't do it. I don't know. I'll have to wait. *I do not know what the defense is* to this case yet." (8 R.T. p.1590.) During rebuttal, the prosecutor stated, absent objection, " . . . , I was sitting here and I

was waiting and waiting and waiting to hear what the defense was in this case. . . ." (8 R.T. p. 1662.) (See AOB 175-176, 179.)

Any challenge to the above comments is waived because no objection was asserted below. (*People v. Gray*, *supra*, 37 Cal.4th at p. 215; *People v. Gutierrez, supra,* 28 Cal.4th at p. 1146; *People v. Boyette*, *supra*, 29 Cal.4th at p. 432; *People v. Coddington*, *supra*, 23 Cal.4th at p. 595.) Furthermore, this Court has repeatedly held that it will not consider claims on appeal where a defendant, as Redd does here, fails to offer authority in support of the claim. (*People v. Smith, supra,* 30 Cal.4th at p. 616, fn. 8; *People v. Catlin*, *supra*, 26 Cal.4th at p. 133; *People v. Barnett*, *supra*, 17 Cal.4th at p.1182; *People v. Hardy*, *supra*, 2 Cal.4th at p. 150.)

In any event, this claim is meritless. Case law has clearly established that a prosecutor may comment on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 505-506; *People v. Valdez, supra,* at p.127; *People v. Frye*, *supra*, 18 Cal.4th at p. 976; *People v. Padilla, supra,* 11 Cal.4th at p. 945; *People v. Medina*, *supra*, 11 Cal.4th at p. 755.) A prosecutor has broad discretion to argue his view as to what the evidence shows and what inferences may be drawn therefrom. (*People v. Sims*, *supra*, 5 Cal.4th at p. 463.) Here, the challenged remarks were merely a comment on the weakness of Redd's theory of the case, and in no way suggested Redd had the burden of proving his innocence. (*People v. Frye, supra*, 18 Cal.4th at p. 973.)

Furthermore, any error was harmless. The prosecutor twice told the jury of the People's burden. He stated, ". . . I have the burden of proof," and, ". . . it's my burden to prove that this defendant committed these crimes. . . ." (8 R.T. p. 1628.) Indeed, the jury was instructed that the People had the burden of proving Redd's guilt beyond a reasonable doubt. (III C.T. p. 265; 8 R.T. p. 1703; see CALJIC No. 2.90.) As such, it is not reasonably possible that a result

more favorable to Redd would have been reached absent the challenged comments. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1019; see also *People v. Samayoa, supra*, 15 Cal.4th at p. 871; *People v. Sanchez, supra*, 12 Cal.4th at p. 69; see *People v. Rowland* (1992) 4 Cal.4th 238, 279-281.)

Redd next asserts that the prosecutor "improperly denigrated defense counsel." (AOB 187, subclaim D.) In light of Redd's failure to specifically identify which comments constituted the alleged error, this assertion should be summarily rejected. This Court has repeatedly held that it will not consider a claim on appeal where the defendant fails to offer supporting argument. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 133; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1182; *People v. Hardy*, *supra*, 2 Cal.4th at p. 150.) Nonetheless, no improper attack on defense counsel's personal integrity or professional tactics can reasonably be gleaned from any of the remarks referred to in Redd's "Procedural Facts" section. In *People v. Taylor*, *supra*, 26 Cal.4th 1155, this Court held, "To observe that an experienced defense counsel will attempt to 'twist' and 'poke' at the prosecution's case does not amount to a personal attack on counsel's integrity." (*Id.* at pp. 1166-1167, citing *People v. Medina*, *supra*, 11 Cal.4th 694; see also *People v. Cole, supra,* 33 Cal.4th at pp.1203-1204; *People v. Bemore*, *supra*, 22 Cal.4th at p. 846, citing *People v. Fierro*, *supra*, 1 Cal.4th at p. 212 & fn. 9 [an argument which criticizes the defense theory of the case because it lacks evidentiary support is not improper].) In other words, the remarks noted within Redd's Procedural Facts section do not demonstrate that the prosecutor crossed the line of acceptable argument, which is traditionally vigorous and therefore accorded wide latitude. (See *People v. Fierro, supra*, 1 Cal.4th at p. 212.)

Redd argues that the prosecutor "improperly vouched for Loya and Jansing." (AOB 188; subclaim E.) This claim is forfeited. In any event, there was no error.

Within the "Procedural Facts" section, respondent located three referenced instances in which the prosecutor commented about two witnesses, Joseph Loya and Officer Jansing. Redd challenges the emphasized portions of the comments.

In the first instance, the prosecutor stated, "Joseph Loya, a nice young man who did something very important in this case." He then commented, "Joseph Loya *deserves our thanks*." After noting Loya's involvement in the case, the prosecutor stated, "*. . . , so these are the kinds of people we presented to you as witnesses. This is the kind of young man that you saw here who was willing to put himself out to do what he felt is right. That is the nature and quality of the these witnesses.*" (See AOB 176; 8 R.T. pp. 1598-1599.) On a second occasion, in reference to Officer Jansing, the prosecutor remarked, "I wanted you to see the quality of him. I *brought him down from San Francisco*." Shortly thereafter, the prosecutor stated, "*A guy like him* (Jansing) *and a guy like Mr. Loya are to be given credit.*" He continued, "*Fortunately for us and fortunately for law enforcement there are people like Mr. Jansing who are willing to do their jobs properly. . . .*" (See AOB 178; 8 R.T. p. 1608.) On a third occasion, the prosecutor remarked that is was indefensible what Redd did and stated, "[Redd] just happened to get caught, *thank you Mr. Loya, thank you Officer Jansing.*" (See AOB 180; 8 R.T. p. 1685.)

Because defense counsel did not to object to any of the above remarks, this portion of Redd's contention is forfeited. Defense counsels' failure to object to the remarks and request a curative admonishment would have avoided any possible prejudice. (See *People v. Visciotti*, *supra*, 2 Cal.4th at p. 83; *People v. Prices*, *supra*, 1Cal.4th at p. 462.) Nonetheless, there was no error. Prosecutor's may not vouch for the credibility of witnesses by placing the prestige of their office behind a witness by creating an impression that steps have been taken to assure that witnesses are truthful. (*People v. Ward*, *supra*,

36 Cal.4th at p. 215.) However, "[p]rosecutorial assurances, based on the record, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper 'vouching,' which usually involves an attempt to bolster a witness by reference to facts outside the record." (*People v. Young*, *supra*, 34 Cal.4th at p.1198, quoting *People v. Medina*, *supra*, 11 Cal.4th at p. 757; *People v. Dickey*, *supra*, 35 Cal.4th at pp. 913-914; see also *People v. Wilson*, *supra*, 36 Cal.4th at p. 338, *People v. Turner* (2004) 34 Cal.4th 406, 432.) Nothing in the noted remarks exceeded such limitations. They were nothing more than commentary on the quality and strength of the witnesses. The prosecutor did not refer to facts outside the record, he did not invoke any personal knowledge as to the credibility of either witness, and he certainly did not "invoke[] either his prestige, or that of his office, in support of a witness' testimony." (See AOB 188.)

In any event, Redd suffered no prejudice. The comments did not deny Redd "a fair trial, divert the jury from its proper role, or invite an irrational, purely subjective response." (*People v. Visciotti*, *supra*, 2 Cal.4th at p. 83, citing *People v. Lewis* (1990) 50 Cal.3d 262, 284.) The jury was instructed with CALJIC Nos. 1.01 and 1.02. which stated that the instructions given to it were to be considered as a whole and that the statements of counsel were not evidence. (See III C.T, pp. 883-884; 8 R.T. pp. 1689-1690.) It is presumed that "'the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.'" (*People v. Morales*, *supra*, 25 Cal.4th at p. 47, quoting *People v. Sanchez*, *supra*, 12 Cal.4th at p. 70; see also *People v. Seaton* (2001) 26 Cal.4th 598, 646.) Redd has failed to establish that the prosecutor used deceptive or reprehensible methods to attempt to persuade the jury or that there is a reasonable likelihood the jury construed or applied the prosecutor's comments in an objectionable fashion. (*People v. Cunningham, supra*, 25 Cal.4th at p.

1019; see also *People v. Samayoa, supra*, 15 Cal.4th at p. 871; *People v. Sanchez, supra*, 12 Cal.4th at p. 69; *People v. Rowland, supra*, 4 Cal.4th at pp. 279-281.)

Redd next asserts that the prosecutor "improperly introduced evidence of future dangerousness." In support of this assertion, Redd argues, "Blithley disregarding the court's attempt to control his questions, the prosecutor elicited evidence from Dr. Morien, the defense expert, to the effect that Redd would be dangerous if allowed to live." (AOB 188.) Once again, Redd fails to specifically identify, by citing to the record, the remarks related to this assertion. In his "Procedural Facts," section Redd asserts that the prosecutor "repeatedly asked [defense expert Norman Morien] about a nonviolent prior escape attempt on the part of Redd." Redd fails however to cite to the record or specifically identify any improper comment. His reference to a side-bar conference that was requested by defense counsel after he objected to the prosecutor's attempt to question Morien about Redd's intellectual capabilities (see AOB 180; 13 R.T. pp. 2649-2650), is of no assistance. During the very lengthy the side-bar (see 13 R.T. pp. 2650-2655), the court commented that both sides were precluded from talking about future dangerousness. (See 13 R.T. p. 2652.) From that point on, Redd does not identify any improper remarks by the prosecutor.

Consequently, respondent is unable to identify the specific basis of Redd's complaint. Because Redd has failed to identify with specificity the challenged conduct, and proffers no facts in support thereof, this contention has not been properly raised and should not be considered. (*People v. Williams* (1997) 16 Cal.4th 153, 206; *People v. Ashmus* (1991) 54 Cal.3d 932, 985, fn. 15.)

In what appears to be an after thought within the claim above, Redd perfunctorily asserts that the prosecutor mislead the jury into believing it could consider nonstatutory aggravating factors. (See AOB 189.) "[E]very brief

should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, [this Court] may treat it as waived, and pass it without consideration. [Citations.]" (*People v. Wilkinson* (2005) 33 Cal.4th 821, 846, fn. 9.)

Redd next asserts that the prosecutor "improperly denigrated the penalty phase expert witnesses." (AOB 189; subclaim G.) This assertion appears to be related to Redd's previous assertion that the prosecutor "argued" with defense expert witness Mandell during cross-examination. (See AOB 181, citing 14 R.T. p. 2885.)

The record demonstrates that, at one point, the prosecutor, apparently not satisfied with the answer to his previous question, attempted to clarify himself and stated to Mandell, "My question - - I don't want to stand and argue with you." Defense counsel objected and asserted, "The question was so broad it was responsive." The court replied, "Hold on. I think we're doing very well. We just need to continue." (14 R.T. p. 2885.) Redd also refers to an instance wherein, after the prosecutor questioned Mandell about the date of a vehicle fire Redd had witnessed, "the defense objected that the questions were argumentative. The prosecutor objected to defense counsel's objections, which had been sustained." (AOB 181, citing 14 R.T. p. 2887.) Defense counsel objected, "argumentative," and that the objection was sustained. (14 R.T. p. 2887.) Redd also asserts that, "Undeterred, the prosecutor continued to argue with the witness, and more objections were sustained." (AOB 181, citing to 14 R.T. pp. 2905-2909.)

As to all of the above remarks identified by Redd, any error was harmless in light of the fact that Redd's objections asserted below were sustained. (*People v. Pinholster, supra*, 1 Cal.4th at p. 943 [generally, a party is not prejudiced by a question to which an objection has been sustained]; *People v. Johnson*, *supra*, 109 Cal.App.4th at p.1236.) Indeed, the jury was

instructed not to consider questions to which an objection had been sustained. (See III C.T. p.743; 8 R.T. pp 1689-1690; CALJIC No. 1.02.). Thus, this assertion must fail.

Redd also contends that the prosecutor, "improperly appealed to the passion or prejudice of the jury." In support thereof, Redd asserts that "by berating the jury and worrying aloud that they would 'not get it,' the prosecutor engaged the personal pride of the jurors. He made their decision a comment about their own intelligence." (AOB 190; subclaim H.) This claim is waived and, is nonetheless unfounded.

Redd argues that, at one point, the prosecutor stated "that he lay awake at night worried that 'you people will not get it.'" (AOB 179.) As demonstrated by the record, the prosecutor's comment has been taken out of context.

During rebuttal argument in the guilt phase, the prosecutor stated, without objection:

> the defense did not talk to you about the evidence which is overwhelming of his guilt. And it concerns me. I am very concerned, representing the State, that one of you has missed the focus of this trial. And that is a nightmare to me. That one of the faces that I'm looking at just doesn't get it. I know most of you have common sense. Some of you want to make this case about something else. It is not about the lawyers. It is not about theories.

(8 R.T. p. 1665.)

Because no objection was asserted below, this claim is waived. (*People v. Gray*, *supra*, 37 Cal.4th at p. 215; *People v. Gutierrez, supra,* 28 Cal.4th at p. 1146; *People v. Boyette*, *supra*, 29 Cal.4th at p. 432; *People v. Coddington*, *supra*, 23 Cal.4th at p. 595.) In any event, there was no error. The challenged remark, viewed in its entirety, was nothing more than vigorous advocacy. The prosecutor merely stressed to the jury the importance of paying attention to the facts of the case, rather than comments of the attorneys, and that it should not

be distracted from what the prosecutor believed to be the relevant evidence and inferences that might properly and logically be drawn therefrom. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 184.) Equally meritless is Redd's contention that the statement "improperly appealed to the passion or prejudice of the jury." As seen above, the statements were clearly not "so inflammatory as to divert the jury's attention from its proper role or invite an irrational response." (*People v. Sanders* (1995) 11 Cal.4th 475, 550.) For essentially the same reason, any error was harmless. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1019; see also *People v. Samayoa, supra*, 15 Cal.4th at p. 871; *People v. Sanchez, supra*, 12 Cal.4th at p. 69; *People v. Rowland, supra*, 4 Cal.4th at pp. 279-281.)

Because Redd has failed to establish that the prosecutor committed any individual error, he has also failed to establish that the cumulative effect of the complained of errors requires reversal (see AOB 190-191; subclaim I). (*People v. Osband* (1996) 13 Cal.4th 622, 700.)

IX.

THE FELONY-MURDER STATUTE IS CONSTITUTIONAL

Redd claims that the felony-murder special circumstance statute is unconstitutional because it: (1) fails to narrow the class of felony-murderers eligible for death (AOB 198-202); (2) fails to require the government to prove mens rea (AOB 202-208); (3) requires the jury be informed that the killing had to be intentional (AOB 208-209); and (4) violates the equal protection clause (AOB 209-210). Well established case law establishes the contrary.

This Court has repeatedly upheld the felony-murder special circumstance as providing a meaningful basis for narrowing death eligibility. (*People v. Ochoa* (2001) 26 Cal.4th 398, 459 [summarily holding that felony murder based on robbery "adequately perform[s] the narrowing function compelled by

the Eighth Amendment"]; *People v. Kraft* (2000) 23 Cal.4th 978, 1078 ["felony-murder special circumstance is not overbroad despite the number of different possible predicate felonies and the lack of a requirement that the killer have had the intent to kill"]; *People v. Frye, supra*, 18 Cal.4th at pp.1029-1030 [felony-murder special circumstance provides meaningful basis for narrowing death eligibility]; *People v. Ray* (1996) 13 Cal.4th 313, 356-357.) Moreover, the United States Supreme Court has found that California's requirement of a special-circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29].) Redd proffers nothing to overcome such well established precedent.

In related contentions, Redd asserts that the felony-murder special circumstances require the government to prove mens rea (AOB 202-208), and that the jury be informed that the killing had to be intentional (AOB 208-209). Redd is mistaken. To the extent Redd continues to proffer that he killed McVeigh "accidently," such circumstance, even if true, is of no consequence. First-degree felony murder encompasses a wide range of possible mental states, including not only deliberate and premeditated murder, but also "unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident." (*People v. Dillon* (1983) 34 Cal.3d 441, 477; *see People v. Randle* (2005) 35 Cal.4th 987, 995, fn. 3.) In other words, "[u]nder the felony-murder doctrine, a defendant who kills accidentally may nevertheless be convicted of murder in the first degree." (*In re Scott* (2004) 119 Cal.App.4th 871, 890 citing *People v. Coefield* (1951) 37 Cal.2d 865, 868.) Put another way:

> When one enters a place with a deadly weapon for the purpose of committing robbery, [as Redd did here], malice is shown by the nature of the attempted crime, and the law fixes upon the offender the intent which makes any killing in the perpetration of or attempt to perpetrate the robbery a murder of the first degree.

(*People v. Coefield, supra*, at pp.868-869; see *People v. Dickey, supra*, 35

Cal.4th at p. 901; *People v. Dennis* (1998) 17 Cal.4th 468, 516; *People v. Jennings* (1988) 46 Cal.3d 963, 979; and *People v. Anderson* (1987) 43 Cal.3d 1104, 1138-1139.) Clearly, Redd's contentions that the People had to prove mens rea and that the jury had to be instructed that the killing was intentional must fail.

This Court has previously rejected Redd's contention (see AOB 209-210) that the felony-murder statute violates the Equal Protection Clause. (*People v. Kennedy* (2005) 36 Cal.4th 595, 640, *People v. Taylor* (1990) 52 Cal.3d 719, 747-748; *People v. Anderson*, *supra*, 43 Cal.3d at p.1147.) This Court should decline Redd's invitation to deviate from such precedent.

X.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT REDD'S TRIAL, DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Redd claims that California's statutory death penalty scheme violates the federal constitution (AOB 212-281), despite the fact that, by his own admission, his challenges to "many aspects of California's death penalty statutory scheme, alone or in combination with each other," have been rejected by this Court. (AOB 212.) Redd proffers no compelling reason why this Court should reexamine such claims.

Redd asserts that section 190.2 is "impermissibly overbroad and therefore invalid," because it "does not meaningfully narrow the pool of murders eligible for the death penalty. (AOB 216-220.) This claim must fail. "The death penalty law adequately narrows the class of death-eligible offenders." (*People v. Manriquez* (2005) 37 Cal.4th 547, 589; *People v. Dickey*, *supra*, 35 Cal.4th at p. 931; *People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Prieto* (2003) 30 Cal.4th 226, 275.)

Redd also asserts that the death verdict in this case must be set aside because "the jury was not instructed on the burden of proof or that it had to find that the aggravating factors outweighed the mitigating factors unanimously and beyond a reasonable doubt." (AOB 221-242.) This Court's precedent states the contrary. (*People v. Manriquez, supra,* 37 Cal.4th at p. 589; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Prieto, supra*, 30 Cal.4th at p. 275.) This Court has held that California's death penalty statute is not lacking in the procedural safeguards necessary to protect against arbitrary and capricious sentencing under the Eighth and Fourteenth Amendments. Neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753, citing in part *People v. Griffin* (2004) 33 Cal.4th 536, 593-594.) Consequently, a trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase. (*People v. Blair, supra*, 36 Cal.4th at p. 753, citing *People v. Carpenter* (1997)15 Cal.4th 312 417-418.)

Redd claims that although "the trial court instructed that the circumstances of homicide could be considered as a mitigating or an aggravating," it "did not instruct that the jury could find them mitigating factors without having to find them beyond a reasonable doubt." Redd then concedes his claim has been previously rejected in *People v. Prieto, supra*, 30 Cal.4th at pp. 271-272, and *People v. Cox* (1991) 53 Cal.3d 618, 673, but "submits this Court's decisions are simply incorrect, especially now in light of" *Ring, Apprendi*, and *Blakely*. (See AOB 243.) For the same reasons this Court rejected a similar claim in *People v. Manriquez, supra,* 37 Cal.4th at p. 590,

denied equal protection because the statutory scheme does not contain disparate sentence review. [Citing *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1053, and *People v. Allen, supra*, 42 Cal.3d at pp. 1286-1288]." (*Id.* at p. 402.) Moreover, capital and noncapital defendants are not similarly situated and thus may be treated differently without offending equal protection principles. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243.)

Redd next asserts that "[t]he California death penalty scheme violates international law." Noting that the United States joins a small minority of countries employing the death penalty on a regular basis, Redd argues that California's use of the death penalty violates international law. He appears to contend that the use of the death penalty is so contrary to the international trend against capital punishment and evolving standards of decency that California's use of capital punishment contravenes due process and Eighth Amendment considerations. (AOB 272-277.) This Court has repeatedly rejected similar arguments. (*People v. Martinez* (2003) 31 Cal.4th 673, 703.) "'International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]'" (*People v. Panah, supra*, 35 Cal.4th at p. 500, quoting *People v. Hillhouse* (2002) 27 Cal.4th at 469, 511; see also *People v. Dickey, supra*, 35 Cal.4th at p. 932.) Redd proffers nothing to justify departure from this solid line of precedent.

Redd claims that "[t]he insufficiency of post-conviction relief undermines the validity of California's death penalty scheme." (AOB 278-279.) To the extent Redd complains about "the severe diminution of the availability of federal habeas corpus relief," (see AOB 278), he is in the wrong jurisdiction. Redd is also utilizing an inappropriate legal vehicle to challenge state procedures relating to the filing a collateral habeas corpus petition in state court. This is, after all, a direct appeal from a judgment of death conducted to ensure that Redd received a fair trial and that the death verdict is reliable.

Other than a general assertion that the combination of the "the severe diminution of the availability of the federal habeas corpus relief," and the "ever-increasing creation of new procedural barriers in California," which he asserts "render the system of review of capital convictions and sentences more arbitrary and less reliable than was contemplated when capital punishment resumed in 1976," (see AOB 278-279) Redd proffers no specific complaint about the appeal process conducted by this Court. Without further explanation, respondent cannot respond to Redd's claim other than to indicate the following: This is an automatic appeal in this state's highest court where Redd is represented by counsel. Redd has filed a 283-page opening brief raising 11 issues, and numerous subclaims. Redd will be afforded the opportunity to file a Reply Brief following the filing of Respondent's Brief. The case will, at some point in the future, be placed on calendar where Redd will be give up to 45 minutes to orally present his case to all seven members of this Court. Redd will be provided a written opinion issued by this Court discussing the claims raised in the opening brief. If Redd is not satisfied with the outcome of his appeal, he can petition this Court for a rehearing. To the extent Redd suggests the direct review process of capital cases in California is insufficient, he overlooks the reality of what occurs in a capital appeal in this state and the guarantee that he received a fair trial and that the death verdict is reliable.

Redd further asserts that he "was prejudiced because he was sentenced to death under an unconstitutional statutory scheme." (AOB 279-280.) As previously explained herein, Redd has failed to establish that California's death penalty statue is unconstitutional, or that he suffered any prejudice.

Citing Judge Noonan's dissenting opinion in *Jeffers v. Lewis* (9th Cir. 1994) 38 F.3d 411, 425-427, Redd argues that "[t]he arbitrary administration of the death penalty renders it unconstitutional." (AOB 281.) Because Redd perfunctorily asserts the instant claim by merely incorporating by reference a

dissenting opinion in a federal case without setting forth the exact context of his claim or providing any specific argument in support thereof, he has failed to state a claim entitling him to relief. In any event, this Court should decline to consider this claim because it is premised on evidence and matters outside the record on appeal and cannot be resolved without reference thereto.

In his dissenting opinion in *Jeffers v. Lewis, supra*, 38 F.3d at pp. 425-427, Judge Noonan opined that Arizona's capital sentencing scheme violated the Eighth Amendment because between 1977 and 1992, 103 people were sentenced to death in that state, but only one person was executed. When *Jeffers* was decided, 117 people were under a sentence of death in Arizona, but no one was executed in 1993 or 1994. (*Id.* at p. 425.) Other than the general assertion that "[t]he circumstances of California's administration of the death penalty, especially as they exist at this time, are strikingly similar to those discussed in the *Jeffers* dissent," Redd fails to specify the basis of his complaint. Therefore, this claim is not properly before this Court. (*People v. Williams* (1997) 16 Cal.4th 153, 206; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 985, fn.15.)

XI.

THERE WAS NO CUMULATIVE ERROR

Redd contends that the effective of the cumulative errors herein require reversal. (AOB 282-283.) Because no error was committed in either the guilt or penalty phase of trial or, to the extent error did occur, because Redd has failed to demonstrate prejudice, reversal of the death verdict is not warranted. Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Manriquez, supra,* 37 Cal.4th at p. 591; *People v. Seaton, supra*, 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa, supra*, 19 Cal.4th at pp. 447, 458; *People*

v. Catlin, supra, 26 Cal.4th at p. 180.) Redd was entitled only to a fair trial, not a perfect one. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1009; *People v. Box, supra*, 23 Cal.4th at pp. 1214, 1219.) Redd received a fair trial, and his claim of cumulative error should be rejected.

CONCLUSION

Based on the above, respondent respectfully requests this Court affirm the judgment of convictions and sentence in its entirety.

Dated: April 28, 2006

Respectfully submitted,

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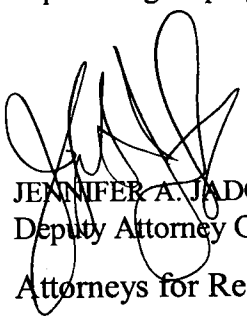

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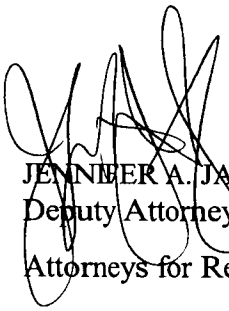
CERTIFICATE OF COMPLIANCE

I certify that the attached respondent's brief uses a 13 point Times New Roman font and contains 29,447 words.

Dated: April 28, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Stephen Redd*** No.: **S059531**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 28, 2006, I served the attached **respondent's brief** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West "A" Street, Suite 1100, San Diego, California 92101, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 28, 2006, at San Diego, California.

Kimberly Wickenhagen
Declarant

Kimberly Wickenhagen
Signature